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Rept. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 69

PANHANDLE EASTERN PIPE LINE COMPANY,
APPELLANT,

vs.

THE PUBLIC SERVICE COMMISSION OF INDIANA,
ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

FILED APRIL 18, 1947.

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from Circuit Court of Randolph County	1	1
Complaint	1	1
Answer	27	21
Petition of Indiana Gas & Water Co., Inc., for leave to intervene	30	23
Supplemental complaint	33	25
Amended answer to supplemental complaint	39	29
Judgment	41	30
Motion for new trial by defendants	43	31
Order overruling motion for new trial and granting appeal	45	32
Motion for new trial by intervening defendants	46	33
Order overruling motion for new trial and granting appeal	48	34
Bill of exceptions	49	34
Caption	49	35
Plaintiff's Exhibit No. 1—Stipulation as to evi- dence, etc.	49	35

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 19, 1947.

Record from Circuit Court of Randolph County—Continued

Bill of exceptions—Continued

Plaintiff's Exhibit No. 2—Proceedings before Public Service Commission of Indiana, Cause No. 16741

	Original	Print
Stipulation of facts	54	37
Exhibit "C"—Map of Main Transmission System of Panhandle Eastern Pipe Line Company	54	37
Exhibit "J-1"—Industrial gas contract between Panhandle and E. I. Du Pont De Nemours & Company, December 14, 1944	87	66
Exhibit "J-2"—Application of Panhandle before Federal Power Commission for a Certificate of Public Convenience and Necessity	88	67
Exhibit "N-1"—Industrial gas contract between Panhandle and Anchor Hocking Glass Corporation, May 11, 1942	92	73
Stipulation of evidence	105	81
Supplemental stipulation of facts	109	87
Exhibit "Q-1"—Order of Federal Power Commission issuing Certificates of Public Convenience and Necessity	119	97
Exhibit "Q-2"—Application of Panhandle for modification of order of Federal Power Commission, etc.	122	99
Exhibit "Q-3"—Answer of Public Service Commission of Indiana to application of Panhandle for modification of order of Federal Power Commission, etc.	128	106
Exhibit "Q-4"—Order of Federal Power Commission modifying order issuing Certificates of Public Convenience and Necessity	132	109
Exhibit "Q-5"—Evidence of issue of Certificate of Public Convenience and Necessity	135	112
Order of Public Service Commission of Indiana, November 21, 1945	138	115
Deposition of Q. W. Morton	140	116
Plaintiff's Exhibit No. 3—Statement of gas sold to certain Utilities and direct Industrial Customers in Indiana, October, 1943 thru September, 1945	226	174
Commission's Exhibit No. 1—Waiver of certain evidence by Commission	230	176
Supplemental stipulation of facts	231	177
Exhibit "A"—First supplemental order of Public Service Commission of Indiana, April 9, 1946	234	178
	236	180

INDEX

iii

Proceedings in Supreme Court of Indiana	246	191
Record entries of filing	246	192
Assignments of error by Public Service Commission of Indiana, et al.	247	192
Assignments of error by Indiana Gas & Water Co., Inc., et al.	249	193
Record entries of filing	251	194
Opinion, Young, J.	255	196
Record entries of filing	284	213
Appellee's petition for rehearing	285	214
Order denying petition for rehearing	294	220
Record entries of filing	294	220
Petition for appeal	295	220
Assignments of error	297	222
Bond on appeal (omitted in printing)	306	
Order allowing appeal	309	228
Citation and service (omitted in printing)	311	
Stipulation as to record on appeal	313	229
Clerk's certificate (omitted in printing)	321	
Statement of points to be relied upon and designation of record	322	234
Order noting probable jurisdiction	323	235

[fol. 1]

**IN CIRCUIT COURT OF RANDOLPH COUNTY, STATE
OF INDIANA**

No. 5440

PANHANDLE EASTERN PIPE LINE COMPANY, Plaintiff,

VS.

THE PUBLIC SERVICE COMMISSION OF INDIANA, LEROY E.
YODER, LAWRENCE E. CARLSEN, and LAWRENCE W. CANNON,
as Members of The Public Service Commission of Indi-
ana, Defendants,

COMPLAINT TO SET ASIDE, VACATE, AND ENJOIN THE ENFORCE-
MENT OF CERTAIN ORDERS OF THE PUBLIC SERVICE COM-
MISSION OF INDIANA

Plaintiff in the above-entitled cause complains of the
defendants, and for cause of action alleges:

1. Plaintiff is a corporation organized and existing under the laws of the State of Delaware, with its principal executive offices in Kansas City, Missouri, and Chicago, Illinois.
2. Panhandle owns and operates certain pipe lines extending from Texas and Kansas through the States of Oklahoma, Kansas, Missouri, Illinois, Indiana, into Ohio and Michigan, in which it transmits natural gas produced or purchased by it, and sells the same principally to local distributing companies for resale and to industrial consumers. Plaintiff neither produces nor purchases any of [fol. 2] such gas in the State of Indiana and neither transports in its pipe lines, or sells, gas produced in said State.
3. Plaintiff does not sell gas generally to the public and has never held itself out as a common carrier or public utility. All of its sales to local distributing companies for resale and to industrial consumers are made under special individual contracts. It has no charter power to act as a public utility and is authorized to do business in Indiana only as a private corporation and not as a public utility.
4. Local distributing companies are supplied with natural gas by means of laterals running off of plaintiff's main pipe

lines. Such gas is reduced in pressure by facilities owned by plaintiff before entering such laterals, and in making deliveries thereof to such distributing companies plaintiff maintains regulators at its town border metering stations, and before such delivery, reduces the pressure of such gas to such pressure as the distributing companies desire to meet operating conditions in their respective systems.

5. Prior to May 11, 1942, plaintiff neither sold nor delivered such gas to consumers of any character in the State of Indiana, except that it supplied gas for residential purposes for a moderate charge to seven of its employees living in company-owned houses located on plaintiff's property. It has never sold, and does not sell, in the State of Indiana any gas to residential or commercial consumers as such. On May 11, 1942, plaintiff commenced the sale of natural gas directly to Anchor-Hocking Glass Corporation, a Delaware corporation, for consumption in the manufacture [fol. 3] of glass containers in a plant adjacent to the City of Winchester, County of Randolph, Indiana, under a written contract entered into at plaintiff's executive office at Kansas City, Missouri, under which it has since supplied, and now supplies, said corporation with natural gas transmitted from outside the State of Indiana, for the purpose and with the intent that gas so transported in the quantities sold to Anchor-Hocking shall be delivered to it. Prior to March 31, 1943, said gas was transported by Michigan Gas Transmission Company, a Delaware corporation, which then owned the facilities hereinafter described, by means of which such gas was delivered to Anchor-Hocking. Prior to March 31, 1943, plaintiff acquired all the outstanding capital stock and securities of Michigan Gas Transmission Company, and on said date caused said Company to be liquidated and acquired ownership of said facilities for the direct delivery of gas to Anchor-Hocking Glass Corporation hereinafter described. Since March 31, 1943, plaintiff has delivered, and is now delivering, natural gas sold under said contract of May 11, 1942, directly to Anchor-Hocking Glass Corporation, in the manner hereinafter described.

6. A portion of the transmission line owned by plaintiff runs from Muncie, Indiana, in a southeasterly direction to a point in Ohio near the Indiana-Ohio state line. At a point in said line approximately seven miles south of the City

of Winchester, Indiana, a six-inch lateral or branch gas transmission line, hereinafter called "Winchester line," extends north from said main line to a point in Randolph County, Indiana, adjacent to the City of Winchester. Adjacent to the northeast corner of the corporate limits of [fol. 4] Winchester, in Randolph County, Indiana, plaintiff owns two meter houses located approximately 400 feet apart, both of which are on property owned by Anchor-Hocking Glass Corporation, in which are housed regulators and meters owned by plaintiff and used respectively in deliveries to Anchor-Hocking Glass Corporation and to Indiana-Ohio Public Service Company, a distributing company, which resells gas to Winchester, Portland, Union City, Indiana, and Union City, Ohio. A branch of the Winchester line runs into each meter house. In each of said meter houses the pressure of the gas is reduced in substantially the same manner. Anchor-Hocking Glass Corporation takes delivery at the outlet side of one of said meter houses, and Indiana-Ohio Public Service Company takes delivery at the outlet side of the other of said meter houses. All gas transmitted through the Winchester line is sold and delivered either to Anchor-Hocking Glass Corporation or Indiana-Ohio Public Service Company, and the quantity thereof delivered to Anchor-Hocking Glass Corporation for its consumption is customarily ten times the amount delivered annually to Indiana-Ohio Public Service Company for resale as aforesaid. The products manufactured by Anchor-Hocking Glass Corporation with the use of said natural gas are largely sold and shipped in interstate commerce throughout the United States. Prior to the entry of the order of the defendant, Public Service Commission, hereinafter described, on November 21, 1945, plaintiff had not at any time, sold or delivered gas to any industrial consumer of the State of Indiana, except Anchor-Hocking Glass Corporation as aforesaid.

[fol. 5] 7. The defendant, The Public Service Commission of Indiana, is an administrative body created by the laws of the State of Indiana, and the defendants LeRoy Yoder, Lawrence E. Carlsen, and Lawrence W. Cannon, are the duly appointed, qualified and acting members thereof.

8. On or about the 13th day of October, 1944, the defendant, The Public Service Commission of Indiana, issued and

4
delivered to plaintiff a copy of the following purported order:

“STATE OF INDIANA
PUBLIC SERVICE COMMISSION OF INDIANA

Cause No. 16741

In the matter of the investigation by the Commission in respect of the distribution by Panhandle Eastern Pipe Line Company, as a public utility, of natural gas to consumers within the State of Indiana.

Approved: October 13, 1944.

Public Service Commission of Indiana, having summarily upon its own motion investigated the matter of the operations of Panhandle Eastern Pipe Line Company in distributing natural gas as a public utility within the State of Indiana, has reason to believe that said Panhandle Eastern Pipe Line Company has heretofore, without the approval of this Commission, purported to take over and acquire certain property and franchise rights used and useful in rendering public utility natural gas service to consumers within the State of Indiana, that said Panhandle Eastern Pipe Line Company has heretofore and is now engaged, as a public utility, in the retail sale of natural gas within the State of Indiana, that said Panhandle Eastern Pipe Line Company has not heretofore had and does not now have on file with and approved by this Commission any schedule of rates, rules and regulations covering sales of natural gas by it to consumers in the State of Indiana, that said Panhandle Eastern Pipe Line Company has not filed with this Commission any annual or other reports in respect of its operations within the State of Indiana, and that said Panhandle Eastern Pipe Line Company may in various respects be violating provisions of the Public Service Commission Act and orders of this Commission applicable to it and its operations.

And it appearing to this Commission from its said investigation that sufficient grounds exist to warrant a formal hearing being ordered as to the matters heretofore investigated, this Commission hereby fur-

[fol. 6] nishes to said Panhandle Eastern Pipe Line Company, pursuant to the requirements of Section 62 of the Public Service Commission Act, this statement notifying said Panhandle Eastern Pipe Line Company of the matters under investigation, which are as follows, to-wit:

1. The facts and circumstances under which said Panhandle Eastern Pipe Line Company has purported to acquire and hold any property, or franchise or other rights, used or useful in or in connection with sales of natural gas to the Anchor-Hocking Glass Corporation, a consumer of natural gas within the State of Indiana, or to any other consumer or consumers of natural gas within the State of Indiana.

2. The nature, period and extent of natural gas service by said Panhandle Eastern Pipe Line Company to said Anchor-Hocking Glass Corporation, or any other consumer of natural gas within the State of Indiana, and the right, if any, of said Panhandle Eastern Pipe Line Company to render any such service.

3. The matter of the failure of said Panhandle Eastern Pipe Line Company to file with this Commission any tariffs, rules and regulations appertaining to natural gas service to such consumer or consumers as it serves within the State of Indiana.

4. The matter of the failure of said Panhandle Eastern Pipe Line Company to file with this Commission an annual report for the calendar year 1942 and the calendar year 1943, or either of them.

5. The matter of the failure of said Panhandle Eastern Pipe Line Company to file with this Commission an original cost report appertaining to its property used and useful in rendering natural gas service to consumers within the State of Indiana.

6. Whether or not said Panhandle Eastern Pipe Line Company is a corporation organized under the laws of the State of Indiana.

7. Whether or not said Panhandle Eastern Pipe Line Company now has, and has had at all times while it has been selling natural gas to consumers within the

State of Indiana, an office in the State of Indiana, and has kept thereat all books, accounts, papers and records required by this Commission to be kept within the State of Indiana.

8. Whether or not said Panhandle Eastern Pipe Line Company has failed to keep any book, account, paper or record required to be kept by it under the orders of this Commission or has failed to comply with any direction of this Commission relating to any such book, account, paper or record.

[fol. 7] 9. Whether or not said Panhandle Eastern Pipe Line Company in any other respect is failing or has failed to comply with, abide by and conform with any applicable provisions of the Public Service Commission Act or of the orders and regulations of this Commission.

Dated at Indianapolis, Indiana, this 13th day of October, 1944.

By order of the Public Service Commission of Indiana.

(S.) Hugh W. Abbett. (Seal.)

Attest:

(S.) Glen L. Steckley, Secretary.

Abbett, Cannon and Barnard concur: approved: October 13, 1944.

I hereby certify that the above is a true and correct copy of order as approved.

(S.) Glen L. Steckley."

Thereafter, on or about the 30th day of October, 1944, said defendant notified plaintiff in writing that a formal hearing with reference to the matters contained in said purported order of October 13, 1944, would be held on November 20, 1944, and ordered that plaintiff appear at said time and place and produce testimony and evidence consisting of its books, records, contracts and documents pertaining to the matters asserted in said purported order of October 13, 1944, to be under investigation.

9. Plaintiff filed no formal response to said purported order of October 13, 1944, but Subdivision I of a Stipulation [fol. 8] of Facts entered into between plaintiff, the Public Counsellor of Indiana, and certain Indiana distributing

companies, permitted by the defendant The Public Service Commission of Indiana to intervene, and filed in said cause on January 9, 1945, prior to any hearing thereof, was in the language following, to-wit:

"It is agreed by and between the parties to this stipulation that Panhandle Eastern Pipe Line Company asserts that any action or order of the Public Service Commission of Indiana herein purporting to regulate, interfere with, or otherwise affect the sale and delivery by Panhandle Eastern Pipe Line Company to Anchor-Hocking Glass Company of natural gas transported by Panhandle in interstate commerce would unduly and unlawfully burden interstate commerce in violation of Article 1, Section 8(3) of the Constitution of the United States, and that if sections 54-112 et seq. Burns Indiana Statutes Annotated, 1933/ or any other Indiana statute, is construed to purport to authorize said commission to regulate, interfere with or otherwise affect such sale and delivery, such statutes as so construed are unconstitutional and void because in violation of Article 1, Section 8(3) of the Constitution of the United States, and denies:

(a) that it sells natural gas in Indiana except as a part of interstate commerce;

(b) that it is engaged in intrastate commerce in the State of Indiana;

(c) that it has transacted or is transacting within the State of Indiana any business as a public utility within said state;

(d) that the sale and delivery of natural gas transported by it in interstate commerce directly to an industrial consumer is subject to the jurisdiction of the Public Service Commission of Indiana;

(e) that it is in any manner subject to the jurisdiction of said commission;

(f) that said commission has any right, power or authority to institute this proceeding against it;

[fol. 9] (g) that the statutory provisions under which this action is instituted (Secs. 54-112, et seq. Burns Indiana Statutes Annotated, 1933) authorizing

investigation by said commission of matters relating to any public utility, have any application to it or its business;

(h) that it is under any obligation to comply with any Indiana statute or any order of said commission relating to public utilities within the State of Indiana; and

(i) that its business or any part thereof is subject to regulation of any character by said commission."

10. Thereafter, and prior to any hearing of evidence in said proceeding, plaintiff filed therein written objections to said proceeding, in the following language, to-wit:

"Comes now, Panhandle Eastern Pipe Line Company, and objects to any further proceeding in this cause and objects to the exercise or purported exercise by the Public Service Commission of Indiana of any jurisdiction with respect thereto and as grounds for said objections and each of them, says:

1. That any action or order of the Public Service Commission of Indiana herein purporting to regulate, interfere with, or otherwise affect the sale and delivery by Panhandle Eastern Pipe Line Company to Anchor-Hocking Glass Company of natural gas transported by Panhandle in interstate commerce would unduly and unlawfully burden interstate commerce in violation of Article I, Section 8(3) of the Constitution of the United States.

2. That if Section 54-1 *et seq.*, Burns Ind. Stat. Ann. 1933, or any other statute of the State of Indiana, is construed as purporting to authorize the Public Service Commission of Indiana to regulate, interfere with, or otherwise affect the sale and delivery by Panhandle Eastern Pipe Line Company to Anchor-Hocking Glass Company of natural gas transported by Panhandle in interstate commerce, such statutes as so construed are unconstitutional and void because they are in violation of Article I, Section 8(3) of the Constitution of the United States.

3. That the statutory provisions under which this proceeding is instituted. (Sections 54-112, *et seq.*, Burns,

Ind. Stat. Ann. 1933) authorizing investigation by the Public Service Commission of Indiana of matters relating to any public utility have no application to Panhandle Eastern Pipe Line Company or its business.

[fol. 10] 4. That the purported order issued herein by Public Service Commission of Indiana on October 13, 1944, for an investigation concerning the matters therein designated, was unauthorized and void.

5. That the purported order issued herein by the Public Service Commission of Indiana on October 30, 1944, requiring Panhandle Eastern Pipe Line Company to appear at a hearing and produce testimony and evidence consisting of its books, records, contracts and documents pertaining to the matters under investigation as set out in said purported order of October 13, 1944, was unauthorized and void.

6. That the Public Service Commission of Indiana has no jurisdiction over the sale and delivery of natural gas sold and delivered in interstate commerce directly to industrial consumers within the State of Indiana.

7. That Panhandle Eastern Pipe Line Company is not transacting, and has never transacted, any business within the State of Indiana as a public utility within said State."

11. With reference to the matters alleged in said purported Order of October 13, 1944, plaintiff says:

(a) No franchise from the State of Indiana authorizing the sale and delivery of natural gas to any industrial consumer in interstate commerce, has been or can lawfully be acquired by it from the State of Indiana, or any agency thereof. Such sales and deliveries at all times have been, and will continue to be component parts of interstate commerce and neither the State of Indiana, nor the Public Service Commission of Indiana has any right, power or authority to require plaintiff to obtain or to attempt to obtain any such franchise in order to sell and deliver such gas. Any attempt on the part of defendants, or any of them, to require such franchise or to interfere with the business of plaintiff because of the lack of such franchise, is unauthorized by the laws of the State of Indiana, and if

any statute of said state is construed to purport to authorize [fol. 11] the same, such statute as so construed and applied to the business of plaintiff is invalid as contrary to Article I, Sect. 8(3) of the Constitution of the United States.

(b) Plaintiff has at no time filed, or had on file with, or approved by, the Public Service Commission of Indiana, any schedule of rates, rules, and regulations covering sales of natural gas by it to consumers in the State of Indiana. No valid law of the State of Indiana requires the filing with, or approval by, said Commission of any schedule of rates, rules, or regulations covering the direct sale of natural gas in interstate commerce to industrial consumers in Indiana, and any statute of said State construed to purport to require such filing or approval would, if applied to the business of plaintiff, unlawfully regulate and burden interstate commerce contrary to Article I, Section 8(3) of the Constitution of the United States.

(c) Plaintiff has at no time filed with the Public Service Commission of Indiana any annual or other reports in respect of any of its operations within the State of Indiana. The laws of the State of Indiana do not require annual or other reports of operations wholly in interstate commerce to be filed with the Public Service Commission of Indiana, and any law of the — Indiana construed to purport to require the filing of any such report would, if applied to the business of plaintiff, unlawfully regulate and burden interstate commerce contrary to Article I, Section 8(3) of the Constitution of the United States.

(d) Plaintiff has at no time filed with the Public Service Commission of Indiana any original or other cost report [fol. 12] appertaining to its property used and useful in rendering natural gas service to consumers in Indiana. The laws of Indiana do not require the filing of any such report with reference to property used wholly in interstate commerce and any law of this state construed to purport to require the filing of any such report would, if applied to the business of plaintiff, unlawfully regulate and burden interstate commerce contrary to Article I, Section 8(3) of the Constitution of the United States.

(e) Plaintiff has not purported to keep books, accounts, papers, or records in the manner required under the orders

and directions of the Public Service Commission of Indiana for public utilities subject to the jurisdiction thereof and is not required by any valid law of the State of Indiana so to keep its records pertaining solely to transactions in interstate commerce and any law of the State of Indiana construed as purporting to require the keeping of its books, accounts, papers, or records in compliance with orders or directions of the Public Service Commission of Indiana would, if applied to the business of plaintiff, unlawfully regulate and burden interstate commerce contrary to Article I, Section 8(3) of the Constitution of the United States.

(f) Plaintiff does not now have and has at no time had an office in the State of Indiana where any books, accounts, papers, or records pertaining to its business are kept, and none of said books, accounts, papers, or records are kept within the State of Indiana. All of its operations and business, including its operations and business in the State of Indiana, are directed, managed, and controlled from its [fol. 13] principal executive offices in Kansas City, Missouri, and Chicago, Illinois, and all of its books, accounts, papers and records are kept at one or the other of said executive offices. No valid law of the State of Indiana requires it to maintain an office in Indiana where books, accounts, papers, and records pertaining wholly to its business in interstate commerce are kept, or to keep such books, accounts, papers, and records within the State of Indiana, and any law of the State of Indiana construed to purport to require the keeping of such books, accounts, papers, and records at an office or elsewhere within the State of Indiana, would, if applied to the business of plaintiff, unlawfully regulate and burden interstate commerce contrary to Article I, Section 8(3) of the Constitution of the United States.

(g) Plaintiff is not now and has at no time been a public utility subject to the jurisdiction of the defendant commission, and any statute of Indiana construed as purporting to subject plaintiff to such jurisdiction unlawfully burdens interstate commerce in violation of Article I, Section 8(3) of the Constitution of the United States.

12. (a) On or about the 14th day of December, 1944, and while said purported proceeding was pending before defendant, the Public Service Commission of Indiana, plain-

tiff entered into a written contract with E. I. DuPont DeNemours & Company, a Delaware corporation, to sell and deliver natural gas to said corporation at its plant located at Fortville, Indiana. Prior to the execution of said contract, but after the commencement of said purported proceeding on October 13, 1944, plaintiff filed with the Federal [fol. 14] Power Commission its application under the Federal Natural Gas Act for a certificate of convenience and necessity to construct a lateral line from one of its main lines to a point near the Town of Fortville, Indiana, and certain facilities incidental thereto, to transport in interstate commerce, sell, and deliver natural gas to two Indiana utilities for resale and to said E. I. DuPont DeNemours & Company for consumption at its plant adjacent to the Town of Fortville, Indiana.

(b) On June 5, 1945, said Federal Power Commission entered its order in said proceeding authorizing the construction of said line to Fortville, but deferring action with reference to the use of said facilities and the construction of additional facilities for the sale and delivery of gas to the DuPont Company on the ground that it was unnecessary to determine such issue so long as plaintiff was prevented from delivering gas to said Company by an order of the War Production Board.

(c) On June 29, 1945, plaintiff filed in said proceeding before the Federal Power Commission an application for a modification of said order of June 5, 1945, showing that said order of the War Production Board had been modified so as to permit plaintiff to supply gas to the DuPont Company if authorized by the Federal Power Commission, to use the facilities to be constructed under said order of June 5, 1945 therefor. The defendant herein, the Public Service Commission of Indiana, which had theretofore intervened in said proceeding before the Federal Power Commission, filed therein an answer on July 9, 1945, object- [fol. 15] ing to modification of said order of June 5, 1945, on the asserted ground that the proposed sale direct to the DuPont Company was wholly intrastate commerce in which plaintiff had no right to engage without compliance with the laws of Indiana relative thereto and that plaintiff had secured no Certificate of Convenience and Necessity from the Public Service Commission of Indiana to serve said DuPont Company as proposed, which was claimed by said

defendant Commission to be required by Chapter 53, Acts of 1945, of Indiana, effective as of February 26, 1945. Said answer asked that said requested modification be denied by the Federal Power Commission, or in the alternative, that it be conditioned on securing from the defendant, The Public Service Commission, a Certificate of Convenience and Necessity to supply said gas to the DuPont Company.

(d) At the time of filing said answer, said defendant knew that Section 54-603, Burns Ann. Stat. 1933 of the laws of Indiana prohibits the granting to any foreign corporation of any license, permit, or franchise to own, operate, manage, or control any plant or equipment of any public utility in this state, and that it had no right, power, or authority to grant such Certificate of Convenience and Necessity to plaintiff, a Delaware Corporation, if it applied therefor. Consequently, the claim of said defendant, asserted in said proceeding, was in substance that the plaintiff could not lawfully perform its contract with the DuPont Company.

(e) On July 10, 1945, said Federal Power Commission, notwithstanding the objection of said defendant herein, entered an order modifying said order of June 5, 1945, and [fol. 16] granting to plaintiff a Certificate of Public Convenience and Necessity, authorizing plaintiff's transportation and service to DuPont subject to the jurisdiction of said Federal Power Commission, which order of modification further specified that it should be without prejudice to the exercise of any jurisdiction which defendants may have to regulate the sale or service proposed to be rendered. Since the modification of said order, plaintiff has caused to be constructed the facilities authorized therein, but had not sold or delivered gas to the DuPont Company prior to the date of the order of the Public Service Commission of Indiana herein sought to be set aside, for the sole reason that said Company was not yet ready for the delivery of such gas. The facilities for the delivery of gas to the DuPont Company under said contract consist of a metering and regulator station with a suitable meter and regulator installed therein by means of which such gas from the Fortville branch line is reduced in pressure for delivery to DuPont at the outlet side of such station in a manner similar to that in which delivery is made to Anchor-Hocking Glass Corporation as aforesaid.

(f) Said defendant, the Public Service Commission of Indiana, included all of the aforesaid matters relating to the sale and delivery of gas in interstate commerce to said DuPont Company in its purported investigation, and entered a purported order with reference thereto as herein-after set forth.

13. On the 21st day of November, 1945, the defendants entered in said cause instituted by said order of October [fol. 17] 13, 1944, a purported order and opinion, a copy of which is attached hereto, made part hereof, and marked Exhibit A. Said opinion asserts that the distribution by plaintiff in Indiana of natural gas direct to consumers is subject to regulation by said defendant Commission under the laws of Indiana. The portion thereof denominated Order, is in words and figures as follows, to-wit:

"It is therefore ordered by Public Service Commission of Indiana that each and all of the objections made by Panhandle Eastern Pipe Line Company, the respondent in this cause, to any of the evidence offered in this cause (except such objections as have heretofore been specifically and finally sustained by the Commission) shall be, and the same and each of them are hereby, overruled; and that all such evidence objected to shall be and is hereby received in evidence in this cause.

It is further ordered that said Panhandle Eastern Pipe Line Company shall, within twenty (20) days after receipt by it of a copy of this order, file with the Bureau of Tariffs of this Commission, in the form prescribed by this Commission, tariffs covering rates, rules and regulations appertaining to any and all sales of natural gas by it direct to ultimate consumers within the State of Indiana.

It is further ordered that said Panhandle Eastern Pipe Line Company shall, within sixty (60) days after receipt by it of a copy of this order, file with this Commission an annual report, in the prescribed form, for each of the calendar years 1942, 1943 and 1944, and shall hereafter, when and as the same become due and so long as it continues to distribute gas direct to any consumer in Indiana, file with this Commission, on the prescribed form, an annual report for each succeeding year.

It is further ordered that said Panhandle Eastern Pipe Line Company shall, within sixty (60) days after the receipt by it of a copy of this order, file with this Commission copies (certified by one of its fiscal officers as true copies) of (a) each and all statements appertaining to its property in such form as filed by it with the Federal Power Commission under and pursuant to Order No. 73 of said commission, adopted April 9, 1940, captioned "Order Requiring Submission of Supplemental Data in Connection with Gas Plant Instruction 2-D of the Uniform System of Accounts under the Natural Gas Act," and (b) each and all journal entries [fol. 18] or proposed journal entries filed by it with said Federal Power Commission under and pursuant to the requirements of Subdivision B of Account No. 391 "Gas Plant Purchased" of the "Uniform System of Accounts Prescribed for Natural Gas Companies Subject to the Provisions of the Natural Gas Act" prescribed by said commission, or of Subdivision B of Account No. 392 "Gas Plant Sold" of said Uniform Classification of Accounts.

It is further ordered that this Commission reserve for subsequent determination in this investigation the matter of what, if any, additional reports and information in respect of the property or operations of said Panhandle Eastern Pipe Line Company this Commission should require to be filed with it by said company.

It is further ordered that this Commission reserve for subsequent determination in this investigation the steps, if any, to be taken by this Commission if Panhandle shall, without first securing a Necessity Certificate under the provisions of Section 97A of the Public Service Commission Act, commence the supplying of natural gas direct to any consumer in Indiana who was not so served by it on February 26, 1945, and who is located in a rural area as defined in said act.

It is further ordered that the secretary of this Commission shall promptly after the entry of this order (a) mail, first class and registered mail, to said Panhandle Eastern Pipe Line Company at its principal office in Indiana, 601 Illinois Building, 17 West Market Street, Indianapolis 4, Indiana, and also at its principal executive office at 135 South LaSalle Street, Chicago 3, Illinois, copies of this order and of the rules and regu-

lations of this Commission governing the construction and filing of schedules of rates, rules and regulations by public utilities other than interurban railways, (b) mail, as printed matter, postage prepaid and insured, to said Panhandle Eastern Pipe Line Company at its said office in Chicago, Illinois, six sets of the form of annual report prescribed by this Commission, and (c) mail, as first class mail and postage prepaid, to counsel of record for said Panhandle Eastern Pipe Line Company, and to each of the other parties to this proceeding and their respective counsel of record, copies of this order; and that said secretary shall forthwith thereafter file in this cause his certificate of such mailings.

It is further ordered that said Panhandle Eastern Pipe Line Company shall, on or before twenty (20) days after the date of this order, pay into the Treasury of the State of Indiana, through the Secretary of this Commission, the sum of \$23.59, said amount being the expenses incurred by this Commission in this investigation (including cost of publication of notices of hearing)."

[fol. 19] On about the — day of December, 1945, the defendant, Public Service Commission, modified the second grammatical paragraph of said order by substituting the words "sixty (60) days" for the words "twenty (20) days" therein.

14. On December 15, 1945, plaintiff at the request of the DuPont Company commenced supplying natural gas to such company under said contract. On December 19, 1945, plaintiff filed in said proceeding before the Public Service Commission, its petition to rescind or otherwise modify the grammatical paragraph of said order purporting to "reserve for subsequent determination in said proceeding the steps, if any, to be taken by this Commission if Panhandle should, without first securing a Necessity Certificate under the provisions of 97A of the Public Service Commission Act, commence the supplying of natural gas direct to any consumer in Indiana who was not so served on February 26, 1945, and who is located in a rural area as defined in said Act" so that the same would not constitute an implied threat to attempt to interfere with and unlawfully burden plain-

tiff's sale and delivery to said DuPont Company in interstate commerce. Said Commission to this date has taken no action with reference to said petition of plaintiff.

15. Plaintiff is adversely affected by said order, and each of the separate paragraphs thereof, and said order and each of said paragraphs are unlawful for the following reasons, and each of them:

(a) Plaintiff is engaged wholly in interstate commerce in the State of Indiana, and not otherwise, and Acts 1913, ch. 76, §61, p. 167 et seq. (Burns Ann. Stat. 54-412, et seq.), under which said proceeding was instituted, do not purport [fol. 20] to authorize an investigation by defendant, the Public Service Commission of Indiana, of any matters relating to plaintiff or its business, and said defendant Commission had no jurisdiction to institute or entertain such proceeding or to make any order therein with reference to plaintiff or its business. If construed to purport to authorize such investigation, such statutes as applied to plaintiff and its business unlawfully regulate and burden interstate commerce, contrary to Article I, Section 8(3) of the Constitution of the United States, and are void as so applied.

(b) Plaintiff is not a public utility within the meaning of any Indiana statute applicable thereto and neither it nor its business is subject to the jurisdiction of the defendant. The Public Service Commission of Indiana, and said defendant has no right, power, or authority to make or enforce orders with reference to plaintiff or the conduct of its business.

(c) The said purported order of the defendant, the Public Service Commission of Indiana, and each separate paragraph thereof is unlawful because the said defendant was without jurisdiction to issue the same.

(d) The said purported order of the defendant, the Public Service Commission of Indiana, and each separate paragraph thereof unlawfully regulates and burdens interstate commerce in violation of Article I, Section 8(3) of the Constitution of the United States.

(e) The defendant, the Public Service Commission of Indiana, has no right, power, or authority to regulate the rates or service of the plaintiff with reference to its direct

sale and delivery in interstate commerce to Anchor-Hocking Glass Company, or to E. I. DuPont DeNemours & Company. The provisions of said order that plaintiff file with the Bureau of Tariffs of the Public Service Commission of Indiana in the form prescribed by said Commission, do not seek information not otherwise available to the Commission for any authorized purpose, but especially in the light of the opinion of the Commission accompanying the same, said filing is ordered for the sole purpose of attempting to regulate, and as a first step in the regulation of, plaintiff's rates and service relating to the sale and delivery of natural gas in interstate commerce and is an invalid assertion of the right to regulate such rates. No such order is authorized by the statutes of Indiana with reference to the sale and delivery of natural gas in interstate commerce to industrial consumers, and any statute of the State of Indiana construed to purport to authorize such order, if applied to the business of plaintiff, unlawfully regulates and burdens interstate commerce in violation of Article I, Section 8(3) of the Constitution of the United States.

(f) The defendants have no right, power, or authority to require plaintiff to file with the Public Service Commission of Indiana annual reports in the form prescribed by the Commission, or in any other form, so long as it is engaged solely in interstate commerce within the State of Indiana. The Provisions of said order requiring the filing of such reports do not seek information not otherwise available to the Commission for any authorized purpose but especially in the light of the opinion of the Commission accompanying the same, said filing was ordered for the sole purpose of attempting to regulate, and as a preliminary step in the regulation of plaintiff's rates and service relating [fol. 22] to the sale and delivery of natural gas in interstate commerce and constitutes an invalid assertion of the right to regulate such rates. No valid law of the State of Indiana authorizes such requirement with reference to corporation engaged only in the sale and delivery of gas in interstate commerce, and any statute of Indiana construed to purport to authorize the order of the Public Service Commission of Indiana requiring plaintiff to prepare and file such statements annually or otherwise, if applied to plaintiff and its business, unlawfully regulates and burdens

interstate commerce contrary to Article I, Section 8(3) of the Constitution of the United States, and is void as so applied.

(g) The defendants have no right, power, or authority to require plaintiff to file with the Public Service Commission of Indiana copies of, (a) each and all statements appertaining to its property in such form as filed by it with the Federal Power Commission under and pursuant to Order No. 73 of said commission, adopted April 9, 1940, captioned "Order Requiring Submission of Supplemental Data in Connection with Gas Plant Instruction 2-D of the Uniform System of Accounts under the Natural Gas Act," and (b) each and all journal entries or proposed journal entries filed by it with said Federal Power Commission under and pursuant to the requirements of Subdivision B of Account No. 391 "Gas Plant Purchased" of the "Uniform System of Accounts Prescribed for Natural Gas Companies Subject to the Provisions of the Natural Gas Act" prescribed by said commission, or of Subdivision B of Account No. 392 "Gas Plant Sold" of said Uniform Classification of Accounts.

[fol: 23] The provisions of said order requiring the filing of such statements and journal entries do not seek information not otherwise available to the Commission for any authorized purpose, but especially in the light of the opinion of said Commission accompanying the same, said filings are ordered for the sole purpose of attempting to regulate, and as a preliminary step in the regulation of, plaintiff's rates and service relating to the sale and delivery of natural gas in interstate commerce and constitute an invalid assertion of the right to regulate such rates. No valid law of the State of Indiana authorizes such order, and any statute of Indiana construed as purporting to authorize the same, if applied to plaintiff or its business, unlawfully regulates and burdens interstate commerce, contrary to Article I, Section 8(3) of the Constitution of the United States.

(h) The defendant, Public Service Commission of Indiana, has no right, power, or authority to order the continuation of said purported investigation or reserve for subsequent determination in said purported investigation, the matter of what, if any, additional reports and information in respect of the property or operations of plaintiff in inter-

state commerce they will require to be filed in the future. No valid law of the State of Indiana authorizes such order, and any statute of Indiana construed as purporting to authorize the same, if applied to plaintiff or its business, unlawfully regulates and burdens interstate commerce, contrary to Article I, Section 8(3) of the Constitution of the United States, and takes plaintiff's property without due process of law in violation of the 14th Amendment to the Constitution of the United States.

(i) The defendant, the Public Service Commission of Indiana has no right, power, or authority to prevent plaintiff [fol. 24] in any manner or to any extent from contracting to sell and deliver, and selling and delivering natural gas direct to industrial consumers in interstate commerce by means of facilities, the construction and use of which for said purposes, are authorized by the Federal Power Commission of the United States, and has no right, power or authority to require plaintiff to obtain or attempt to obtain a Certificate of Public Convenience and Necessity therefor under the provisions of Ch. 53 of the Acts of 1945 of the Indiana General Assembly. The purported order of the Commission reserving for subsequent determination in said purported investigation any steps to be taken by said Commission if plaintiff shall "without first securing a Necessity Certificate under the provisions of Section 97A of the Public Service Commission Act, commence the supplying of natural gas direct to any consumer in Indiana not so served by it on February 26, 1945, and located in a rural area as defined in said Act," constitutes an implied threat to interfere with and burden plaintiff's sale and delivery of gas in interstate commerce to E. I. DuPont DeNemours & Company, or at its plant adjacent to Fortville, Indiana which sales commenced on December 15, 1945. Neither Ch. 53 of the Acts of 1945 of the General Assembly of Indiana, nor any other Indiana statute authorizing any action to be taken by the defendant, the Public Service Commission of Indiana, interfering with said sale or the lawful right of plaintiff to make the sale, and any statute of Indiana construed to purport to authorize such order with reference to plaintiff and its business or any action thereunder at [fol. 25] tempting to interfere with or prevent such sale and delivery is, as so construed and applied to plaintiff and its business, an unlawful attempt to regulate and

burden interstate commerce in violation of Article I, Section 8(3) of the Constitution of the United States, and is void as applied to plaintiff.

Wherefore, plaintiff prays that a hearing be had at a time fixed by the Court on a temporary order of injunction, enjoining the defendants, and each of them, from enforcing or attempting to enforce said order of November 21, 1945, or any separate paragraph thereof, pending the final determination of this cause, that on said hearing defendants, and each of them, be enjoined pending such final determination; and that on final hearing said order of the Public Service Commission of Indiana and each paragraph thereof be vacated and set aside, and said order of injunction enjoining the enforcement of said order or any paragraph thereof by the defendants be made permanent, and for all other proper relief.

Bowen, Mendenhall & Hunter; Crumpacker, May, Carlisle & Beame; Barnes, Hickman, Pantzer & Boyd, Attorneys for Plaintiff.

[fol. 26] *Duly sworn to by Leith V. Watkins, jurat omitted in printing.*

[fol. 27] IN CIRCUIT COURT OF RANDOLPH COUNTY

[Title omitted]

ANSWER

Come now the defendants in the above entitled cause and for their separate answer to the complaint herein each of them separately says:

1. That they admit the facts alleged in rhetorical paragraphs numbered 1, 2, 4, 7, 9, 10 and 14.

2. That they deny the allegations contained in rhetorical paragraphs 3, 5, and 6 and in rhetorical paragraph 15 and each sub-paragraph thereof.

3. That they admit that the order set forth in rhetorical paragraph No. 8 was issued as therein alleged but deny that said order was in any way specious or not genuine or that it merely purported to be an order and they admit

the other allegations contained in said rhetorical paragraph No. 8.

4. That they deny the allegations contained in rhetorical paragraph No. 11 sub-paragraph (a); that they admit the allegations contained in the first sentence of rhetorical paragraph No. 11 sub-paragraph (b) and deny the allegations contained in the remaining portion of sub-paragraph (b); that they admit the allegations contained in the first [fo 28] sentence of rhetorical paragraph No. 11 sub-paragraph (c) and deny the allegations contained in the remaining portion of said sub-paragraph (c); that they admit the allegations contained in the first sentence of rhetorical paragraph No. 11 sub-paragraph (d) and deny the allegations contained in the remaining portion of said sub-paragraph (d); that they admit the allegation that "plaintiff has not purported to keep books, accounts, papers or records in the manner required under the orders and directions of the Public Service Commission of Indiana for public utilities subject to the jurisdiction thereof" and deny the allegations contained in the remaining portion of rhetorical paragraph No. 11 sub-paragraph (e); that they admit the allegations contained in the first sentence of rhetorical paragraph No. 11 sub-paragraph (f) and deny the allegations contained in the remaining portion of said sub-paragraph (f); and that they deny the allegations contained in rhetorical paragraph No. 11 sub-paragraph (g).

5. That they admit that the contract for delivery to and the use of natural gas by DuPont in rural territory near Fortville, Indiana, referred to in rhetorical paragraph No. 12 (a) was executed at the time mentioned but they deny that the order referred to was in any way specious or not genuine or that it merely purported to be an order; that they admit that the proceedings before the Federal Power Commission and the order thereon referred to in rhetorical paragraph No. 12 sub-paragraphs (a) and (b) to secure the right to construct facilities for the transportation of natural gas were instituted under Section 7 (c) of the Federal Natural Gas Act (Section 717 f (c) U. S. C. A.) and they deny the rest of the allegations contained in said sub-paragraphs (a) and (b); that they admit the allegations contained in rhetorical paragraph No. 12 sub-paragraph (c); that they deny the allegations contained in rhetorical paragraph No. 12 (d); that they admit the

[fol. 29] allegations contained in rhetorical paragraph No. 12 sub-paragraph (e) to the effect that the petition referred to in rhetorical paragraph No. 12 subsections (a) and (b) to transport gas to DuPont under Section 7 (c) of the Federal Natural Gas Act was granted so far as the Federal Power Commission was concerned but stipulated that "this order is without prejudice to the authority of the Indiana Commission (Public Service Commission of Indiana) in the exercise of any jurisdiction which it may have over the sale or service proposed to be rendered by Panhandle Eastern to DuPont"; that they admit that the proposed sale of natural gas to DuPont was considered by the Commission in its investigation, finding and order herein as alleged in rhetorical paragraph No. 12 sub-paragraph (f).

6. That they admit that Exhibit A attached to the complaint, a printed copy of which contains 86 pages, was issued as alleged in rhetorical paragraph 13 and deny the remaining allegations contained in said rhetorical paragraph No. 13.

James A. Emmert, Attorney General of Indiana,
Frank E. Coughlin, First Assistant Attorney General,
Urban C. Stever, Deputy Attorney General,
Karl J. Stipher, Deputy Attorney General; Attorneys for Public Service Commission, defendant,
and Members.

[fol. 30] IN CIRCUIT COURT OF RANDOLPH COUNTY

[Title omitted]

PETITION FOR LEAVE TO INTERVENE

Comes now Indiana Gas & Water Company, Inc., an Indiana corporation, and represents and shows to the court that it is interested in the above entitled cause and is entitled to intervene in said cause and to participate in said proceedings as a party defendant and to have all the rights of a party defendant in such action including the right to appeal, for the following reasons:

1. Indiana Gas & Water Company, Inc., is a public utility as that term is defined in the Public Service Commission Act,

and is engaged in rendering, among other services, natural gas utility service in and adjacent to 30 municipalities and 6 unincorporated communities within the State of Indiana. It renders such service to approximately 53,900 residential, commercial and industrial consumers in said territory. A substantial portion of the natural gas distributed by Indiana Gas & Water Company, Inc. is purchased by it from Panhandle Eastern Pipe Line Company and the lines and facilities of said Panhandle Eastern Pipe Line Company extend across the territory served by Indiana Gas & Water Company, Inc.

2. The above proceeding relates directly to the question of the power and authority of the Public Service Commission of Indiana to regulate the distribution and sale of natural gas to ultimate consumers in Indiana, including industrial consumers. Indiana Gas & Water Company, Inc., a public utility subject to the jurisdiction and regulation of said commission in the distribution of natural gas, has a direct interest in said issue and will be directly affected by the determination thereof.

3. Intervention or participation by Indiana Gas & Water Company, Inc. in these proceedings is in the public interest in that the interests of the various classes of Indiana consumers served by Indiana Gas & Water Company, Inc. and the investors in the securities of said Indiana Gas & Water Company, Inc. ~~will be~~ affected by the results of these proceedings and by the determination of whether or not the present and proposed activities of the plaintiff are proper subjects for regulation by the Public Service Commission of Indiana and the decision of the fundamental issues involved in these proceedings will have a direct bearing on the operations of Indiana Gas & Water Company, Inc. and its natural gas utility service in the areas in Indiana served by it.

4. After the institution of the proceedings before the Public Service Commission of Indiana which are referred to in the above entitled cause and which resulted in the order of said commission which is the subject of attack in this cause, your petitioner became the successor in interest of all the public utility gas business and properties of Public Service Company of Indiana, Inc., which latter company was by order of said Public Service Commission

permitted to intervene and to participate actively in the introduction of evidence, the examination of witnesses, the filing of briefs and the presenting of oral argument in said proceedings before said Public Service Commission. The [fol. 32] position and interests of this petitioner are identical with the position and interests which the Public Service Company of Indiana, Inc. had at the time that company was so permitted to intervene and it is also in the public interest that said Indiana Gas & Water Company, Inc. for the reasons hereinbefore stated be permitted to intervene in this cause.

Wherefore said Indiana Gas & Water Company, Inc. prays that the court issue its order in this cause authorizing and permitting said Indiana Gas & Water Company, Inc. to intervene and to participate in these proceedings as a party defendant and to have all the rights of any party to such action, including the right to appeal.

Evans & Hebel by William P. Evans, Attorneys for
Petitioner, Indiana Gas & Water Company, Inc.

Duly sworn to by William P. Evans. Jurat omitted in printing.

[fol. 33] IN CIRCUIT COURT OF RANDOLPH COUNTY

[Title omitted]

PLAINTIFF'S SUPPLEMENTAL COMPLAINT

Comes now the plaintiff in the above entitled cause and by leave of Court complains of the defendants by way of Supplemental Complaint and for cause of complaint, alleges:

1. That subsequent to the trial of this cause on March 6, 1946, plaintiff on March 21, 1946 forwarded by United States mail to the defendant Public Service Commission of Indiana for filing in the proceeding complained of herein, being Cause No. 16741 before said Commission entitled "In the matter of the Investigation by the Commission in respect of the Distribution by Panhandle Eastern Pipe Line Company, as a Public Utility, of Natural Gas to Consumers Within the State of Indiana," a document entitled "Offer of Respondent to Furnish Information Designated by Com-

mission Order Dated November 21, 1945, on Condition That the Same Be Accepted by the Commission as Information Only and That Said Order Dated November 21, 1945 Be So Modified as to State Unequivocally That It Involves No Assertion of Any Jurisdiction of Authority of the Commission to Regulate the Business of Respondent of Selling and [fol. 34] Directly Delivering Natural Gas Transported in Interstate Commerce to Industrial Consumers in the State of Indiana, and Seeks the Filing of the Reports and Documents Designated in Said Order for Information Purposes only. That said document, omitting formal parts, was in the following words and figures, to-wit:

"Comes now Panhandle Eastern Pipeline Company and respectfully shows this Honorable Commission:

1. That this Respondent has at all times throughout this proceeding asserted and insisted, and continues to assert and insist, that it is engaged solely in interstate commerce in the State of Indiana, that this Commission consequently has no jurisdiction of Respondent or its business, and that any statute of Indiana construed to purport to confer such jurisdiction as applied to Respondent and its business is void because in violation of Article I, Section 8(3) of the Constitution of the United States.

2. That Respondent has asserted and continues to assert such position in the proceeding to set aside and vacate such order in Cause No. 5440 in the Randolph Circuit Court entitled *Panhandle Eastern Pipeline Company v. The Public Service Commission, et al.*, which cause has been heretofore tried in said Court and taken under advisement.

3. That at the time said action was commenced Respondent in good faith understood and believed and still believes that said order dated November 21, 1945 constituted and constitutes an assertion of the right and authority to regulate the rates and service of Respondent in its business of selling and directly delivering natural gas transported in interstate commerce [fol. 35] to certain industrial consumers as shown by the record in said cause which business Respondent contends is protected from such regulation by Article I, Section 8(3) of the Commerce Clause.

4. That this Commission has now asserted by arguments and brief in said action in the Randolph Circuit Court that the papers and documents which Respondent is ordered to file by said order dated November 21, 1945 are sought by it for information purposes only and not as an assertion of jurisdiction to regulate Respondent's rates and service for direct sales and deliveries to industrial consumers within the State of Indiana.

5. Respondent denies that the Commission is authorized by law to require the filing of the papers and documents ordered filed by said order dated November 21, 1945 for the reason that the same are not relevant to the exercise of any jurisdiction which the Commission possesses and no part of the business of Respondent is subject to its jurisdiction. However, Respondent has no desire to withhold from the Commission any matters designated in said order which are desired solely for information purposes, even though the preparation and filing of the same hereafter will be burdensome to Respondent, *provided* the filing of the same would in no way prejudice its position that the Commission has no jurisdiction or authority to regulate its said business in the event that any attempt to regulate the same should hereafter be made by the Commission. In view of the assertions heretofore made in said order and now made by the Commission in arguments and briefs in said cause in the Randolph Circuit Court that the Commission has such regulatory [fol. 36] jurisdiction Respondent cannot be certain that it would not be prejudiced in said position if it should comply with the order as now entered unless the Commission by modification thereof specifically states in its order that said papers and documents are sought for information purposes only, and that said order is not to be construed as an assertion of any regulatory jurisdiction of Respondent or its business.

6. Respondent therefore now offers to file with the Commission all papers and documents specified in the order dated November 21, 1945, *provided* the Commission desires the same for information purposes only and not as an assertion of the regulatory jurisdiction of Respondent's business, and *provided* said order is

so modified or such further order is entered by the Commission as to preclude the possibility of any contention hereafter that Respondent will be in any manner prejudiced in its right to contest the jurisdiction of the Commission to regulate its said business in the event the Commission shall hereafter assert the right, power, authority or jurisdiction to regulate the same.

7. In the event that the order of the Commission dated November 21, 1945 is so modified or such further order is entered as to protect Respondent from any prejudice in its right to contest hereafter the jurisdiction and authority of the Commission to regulate its said business in the event that the Commission shall hereafter assert the right, power, authority or jurisdiction to regulate the same, Respondent will furnish the information designated in said order dated November 21, 1945 within such reasonable time as shall be designated [fol. 37] by the Commission and will dismiss said action now pending in the Randolph Circuit Court without prejudice and at its costs.

8. While Respondent is willing to afford the Commission a full opportunity to consider and accept or reject the proposal herein made, attention is called to the fact that the time for filing Respondent's reply brief in said cause in the Randolph Circuit Court will expire on Thursday, March 28, 1946 and that said cause will then be ready for decision by that Court."

2. That concurrently therewith plaintiff placed in the United States mail addressed to the Attorney General of Indiana the following letter:

"We enclose herewith copy of a document today to the Secretary of the Public Service Commission of Indiana for filing, together with a copy of the letter to the Secretary of the Commission.

"You are hereby notified that Panhandle Eastern Pipeline Company as plaintiff in Cause No. 5440 now pending in the Randolph Circuit Court will file in said cause at the time of filing its Reply Brief therein on Thursday, March 28, 1946, its application for leave to file a supplemental complaint setting forth therein filing of the enclosed document with the Public Service Commission of Indiana its action thereon, if any, or its

failure to act thereon, on or before March 27, 1946, and will further ask leave to reopen the trial of said cause [fol. 38] for the purpose of introducing evidence in support of the allegations of said supplemental complaint.

"Formal notice, together with a copy of the application to be filed and the supplemental complaint to be tendered for filing, will be sent to you in advance of the date fixed."

3. Notwithstanding the aforesaid offer, the defendant Public Service Commission of Indiana has, to this date, failed to take any action accepting the same or to take any action whatever in connection therewith.

4. That plaintiff has at all times insisted and continues insist that the Order of said defendant Commission dated November 21, 1945 was intended to and does assert regulatory jurisdiction over the business of plaintiff of selling direct to industrial consumers in Indiana natural gas transported in interstate commerce and that its failure to take action accepting the terms of said offer, said defendant Public Service Commission of Indiana has construed said Order as an Order asserting such regulatory jurisdiction, instead of as an Order merely seeking certain information from plaintiff as claimed at the argument by said Commission and in its brief filed on or about March 19, 1946.

Wherefore, plaintiff seeks judgment as prayed for in the original complaint and for all other proper relief.

_____, _____, _____, _____, _____, Attorneys for
Plaintiff.

[fol. 39] IN CIRCUIT COURT OF RANDOLPH COUNTY

[Title omitted]

AMENDED ANSWER OF THE DEFENDANT PUBLIC SERVICE COMMISSION OF INDIANA TO PLAINTIFF'S SUPPLEMENTAL COMPLAINT

The defendant, the Public Service Commission of Indiana, for its amended answer to the plaintiff's supplemental complaint herein says:

1. In answer to plaintiff's rhetorical paragraph number one of the supplemental complaint, defendant admits that

on the 21st day of March, 1946, plaintiff mailed to the Secretary of the Commission, in cause No. 16741, a document for filing as set out in plaintiff's rhetorical paragraph number one.

2. The defendant admits the mailing of the letter, as set forth in rhetorical paragraph number two of the supplemental complaint to the Attorney General of Indiana.

3. In answer to rhetorical paragraph number three of the supplemental complaint, the defendant admits that up to the date of the filing of the supplemental complaint the Commission had not acted on the petition filed with it on March 21, 1946, but defendant further says that since the date of filing of the supplemental complaint, the Public Service Commission did on April 9, 1946 deny said petition.

4. The defendant denies the allegations set forth in rhetorical paragraph number four of the supplemental complaint.

James A. Emmert, Attorney General of Indiana;
[fol. 40] Frank E. Coughlin, First Assistant Attorney General; Karl J. Stipher, Deputy Attorney General; Urban C. Stover, Deputy Attorney General.

[fol. 41] IN CIRCUIT COURT OF RANDOLPH COUNTY

[Title omitted]

JUDGMENT—May 11, 1946

Come now the plaintiff, the defendants, and the intervenors by their respective counsel, and the Court having heretofore heard the evidence and argument of counsel, and being duly advised in the premises, finds that the allegations of the complaint are true and that the order of the defendant The Public Service Commission of Indiana, entered November 21, 1945, and its order supplemental thereto dated April 9, 1946, should be vacated and set aside, and the defendant The Public Service Commission of Indiana and the defendant members thereof should be perpetually enjoined from the enforcement thereof.

It is, Therefore, Ordered, Adjudged and Decreed that the order of the defendant The Public Service Commission

of Indiana, entered November 21, 1945, and the order supplemental thereto dated April 9, 1946, complained of in this proceeding, be and they are hereby vacated and set aside.

It is Further Ordered that the defendant The Public Service Commission of Indiana and the defendant members [fol. 42] thereof be and they are hereby perpetually enjoined and restrained from enforcing said order or any paragraph thereof against the plaintiff.

It is Further Ordered that plaintiff recover of the defendants all costs of this proceeding taxed at \$9.50.

John W. Macy, Judge of the Randolph Circuit Court.

[fol. 43] IN CIRCUIT COURT OF RANDOLPH COUNTY

[Title omitted]

MOTION FOR A NEW TRIAL BY PUBLIC SERVICE COMMISSION OF INDIANA AND MEMBERS THEREOF

The defendants, the Public Service Commission of Indiana and LeRoy E. Yoder, Lawrence E. Carlson, and Lawrence W. Cannon as members of the Public Service Commission of Indiana, each separately and severally pray that the court will grant a new trial in this cause on each of the following grounds:

1. The decision of the court is not sustained by sufficient evidence.
2. The decision of the court is contrary to law.
3. The court erred in receiving and considering the supplemental complaint filed in this cause.
4. The court erred in taking into account the supplemental complaint and order of the Commission entered after this case was filed by the plaintiff and tried.
5. Irregularity in the proceedings of the Court in that the Court overruled defendants' objections to the filing of the supplemental complaint and reopening the trial for further evidence.

[fol. 44] 6. The court erred in admitting into evidence and considering the supplemental order of the Commission, entered April 9, 1946.

James A. Emmert, Attorney General of Indiana;
 Frank E. Coughlin, First Assistant Attorney General;
 Karl J. Stipher, Deputy Attorney General;
 Urban C. Stover, Deputy Attorney General.

[fol. 45] IN CIRCUIT COURT OF RANDOLPH COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR A NEW TRIAL AND GRANTING
 APPEAL

Come now the defendants, The Public Service Commission of Indiana, LeRoy E. Yoder, Lawrence E. Carlson and Lawrence W. Cannon, as members of the Public Service Commission of Indiana by their attorneys and file their separate and several motion for a new trial herein in the following words and figures to wit (here insert) and the court being duly advised now overrules said motion for a new trial to which ruling said defendants and each of them except, and the Public Service Commission of Indiana and members thereof now in open court pray an appeal to the Supreme Court of Indiana from the judgment herein, and it appearing that the Public Service Commission of Indiana is an agency of the State of Indiana and the members of said Commission are officers of the State of Indiana, and the judgment herein is against the State and the members of said Commission in their official capacity, the court now grants said appeal without the filing of a bond, and the Court further orders that the transcript of the record, made before the Public Service Commission and filed in this case, be made a part of the transcript on appeal without copying in accordance with Rule 2-4 of the Supreme Court of Indiana, and the court grants 60 days within which all Bills of Exception shall be tendered and filed.

[fol. 46] IN CIRCUIT COURT OF RANDOLPH COUNTY

[Title omitted]

MOTION FOR NEW TRIAL BY INTERVENING DEFENDANTS.

The intervening defendants in the above entitled cause, Indiana Gas & Water Company, Inc., by its attorneys William P. Evans and Edmond W. Hebel; Central Indiana Gas Company, by its attorneys Robert R. Batton and Carl E. Hartley; Northern Indiana Public Service Company, by its attorneys John C. Lawyer and R. Stanley Anderson; Kokomo Gas & Fuel Company, by its attorney John E. Fell; Southern Indiana Gas & Electric Company by its attorney Edmund F. Ortmeyer; and Greenfield Gas Company, Inc., by its attorney William A. McClellan, each of said defendants having been heretofore on order of this court permitted to intervene herein and each of said defendants on order of this court having been constituted an intervening defendant, do now each separately and severally move the court to grant a new trial in this cause on each of the following grounds, to-wit:

1. The decision of the court is not sustained by sufficient evidence.

2. The decision of the court is contrary to law.

Respectfully submitted, Indiana Gas & Water Company, Inc. By William P. Evans. By Edmond W. Hebel. By Russell E. Wise, Its Attorneys. [fol. 47] Central Indiana Gas Company. By Robert R. Batton. By Carl E. Hartley, Its Attorneys. Northern Indiana Public Service Company, By John C. Lawyer, R. Stanley Anderson, Its Attorneys. Kokomo Gas & Fuel Company, By John E. Fell, Its Attorney. Southern Indiana Gas & Electric Company, By Edmund F. Ortmeyer, Its Attorney. Greenfield Gas Company, Inc., By William A. McClellan, Its Attorney.

[fol 48] IN CIRCUIT COURT OF RANDOLPH COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL OF INTERVENING
DEFENDANTS AND GRANTING APPEAL

Come now the intervening defendants in the above entitled cause, Indiana Gas & Water Company, Inc., by its attorneys William P. Evans and Edmond W. Hebel; Central Indiana Gas Company, by its attorneys Robert R. Batton and Carl E. Hartley; Northern Indiana Public Service Company, by its attorneys John S. Lawyer and R. Stanley Anderson; Kokomo Gas & Fuel Company, by its attorney John E. Fell; Southern Indiana Gas & Electric Company, by its attorney Edmund E. Ortmeier and Greenfield Gas Company, Inc., by its attorney William A. McClellan, each having been constituted intervening defendants, and file their separate and several Motion for a New Trial herein which is in the following words and figures, to-wit:

(H. I.)

And the court being duly advised now overrules said Motion for a New Trial, to which ruling said intervening defendants and each of them except, and said intervening defendants and each of them now in open court pray an appeal to the Supreme Court of Indiana from the judgment herein and the court now grants said appeal.

John W. Macy, Judge, Randolph Circuit Court.

Dated this 7th day of June, 1946.

[fol. 49] IN CIRCUIT COURT OF RANDOLPH COUNTY

Cause No. 5440

PANHANDLE EASTERN PIPE LINE COMPANY, Plaintiff,

vs.

THE PUBLIC SERVICE COMMISSION OF INDIANA, et al.,
Defendants

Bill of Exceptions

PLAINTIFF'S EXHIBIT No. 1

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto as follows, to wit:

1. Plaintiff will offer in evidence at the trial of this cause the complete transcript of all the pleadings, evidence and entries filed, introduced with and made for and by the Public Service Commission of Indiana in the proceeding complained of in this action as prepared and filed with the Clerk of this Court by said Commission, but shall not by offering and introducing the same in evidence in this cause without objection be deemed to have waived any objection to the relevancy of any portion thereof to which objection was made as shown by said record at the time the same was offered in evidence in said proceeding before the Public Service Commission of Indiana.

2. No stipulation of fact introduced in said proceeding before the Public Service Commission, as shown by said transcript and as contained therein, shall be contradicted by any evidence introduced in this proceeding, subject to [fol. 50] the correction in paragraph 3 hereof.

*3. Paragraph 25 of the stipulation of facts dated January 9, 1945, contained in said transcript, reads as follows: "In 1943 Panhandle sold 1,150,279 cubic feet of natural gas to Anchor-Hocking and 151,063 cubic feet of natural gas to Ohio Public Service Company."

Paragraph 16 of the Findings of Fact made by the Public Service Commission of Indiana in this proceeding and incorporated in its order in this cause contains the following statement: "In 1943 Panhandle sold 1,150,279 m. c. f. of

natural gas to Anchor-Hocking and 151,065 m. c. f. of natural gas to Indiana-Ohio Company." The figure contained in said statement in paragraph 16 of the Findings of Fact of the Public Service Commission of Indiana in this proceeding is correct, and the statement in paragraph 25 of said stipulation hereinbefore quoted is incorrect.

4. Exhibit 1 attached to this stipulation and made a part hereof is a true copy of the provisions of the Articles of Incorporation of Panhandle Eastern Pipe Line Company relating to its corporate powers.

5. The contract referred to in paragraph 5 of the plaintiff's complaint as having been entered into between plaintiff and Anchor-Hocking Glass Corporation on May 11, 1942, under which plaintiff sells and delivers natural gas to said Company, a copy of which contract is contained in the transcript of the proceedings before the Public Service Commission filed herein, being identified as Exhibit N-1 to [fol. 51] the stipulation of Facts dated January 9, 1945, introduced in evidence in said proceeding, was executed by Anchor-Hocking Glass Corporation in the State of Ohio and by plaintiff at its executive office at Kansas City, Missouri.

6. By the introduction in evidence in this cause of this stipulation, paragraph 3 hereof, paragraph 4 hereof, including Exhibit 1, and paragraph 5 hereof shall become a part of the record in this cause to the same extent as though they had been incorporated in the Stipulation of Facts dated January 9, 1945, introduced in evidence in the proceeding before the Public Service Commission of Indiana complained of herein as contained in said transcript of said proceedings filed herein.

7. Each party hereto reserves the right to introduce further evidence herein, including evidence to supplement and explain, but not to contradict, the facts herein stipulated, together with the facts stipulated in said proceeding before the Public Service Commission of Indiana as shown by the transcript thereof.

8. Any party in this cause desiring to introduce evidence in addition to that contained in the transcript of the defendant Public Service Commission referred to in paragraph 1 of this Stipulation, or in addition to the matters contained

in this Stipulation, shall submit to the other party or parties in this cause at least ten (10) days prior to March 6, 1946 a written statement of the character and scope of such evidence, including the name of the witness or witnesses whose testimony is to be offered, to introduce the [fol. 52] same, together with a copy of any exhibit or exhibits to be introduced in connection with such evidence. A Deposition of any such witness taken on or before ten (10) days prior to said date shall constitute a compliance herewith. No additional evidence shall be introduced by any party at the trial of this cause unless previously submitted in accordance with the requirements of this paragraph.

William Hunter, George N. Beamer, Barnes, Hickman, Pantzer and Boyd, Attorneys for Plaintiff. James A. Emmert, Atty. Gen'l; Frank Coughlin, 1st Assistant; Urban C. Stover, Deputy; Attorneys for Defendants. Evans & Hibel, by Wm. P. Evans, Attorneys for Intervenor Indiana Gas & Water Co. Van Atta, Batton and Harker, by Robert R. [fol. 53] Batton, C. H., Central Indiana Gas Co. John E. Fell, Attorneys for Kokomo Gas & Fuel Co. R. Stanley Anderson, for Northern Indiana Public Service Co.

[fol. 54] PLAINTIFF'S EXHIBIT No. 2

STATE OF INDIANA, PUBLIC SERVICE COMMISSION OF INDIANA

Cause No. 16741

In the Matter of the Investigation by the Commission in Respect of the Distribution by Panhandle Eastern Pipe Line Company, as a Public Utility, of Natural Gas to Consumers Within the State of Indiana

STIPULATION OF FACTS—Filed January 9, 1945

I

It is agreed by and between the parties to this stipulation that Panhandle Eastern Pipe Line Company asserts that any action or order of the Public Service Commission of Indiana herein purporting to regulate, interfere with,

or otherwise affect the sale and delivery by Panhandle Eastern Pipe Line Company to Anchor-Hocking Glass Company of natural gas transported by Panhandle in interstate commerce would unduly and unlawfully burden interstate commerce in violation of Article 1, Section 8 (3) of the Constitution of the United States, and that if sections 54-112 et seq. Burns Indiana Statutes Annotated, 1933, or any other Indiana statute, is construed to purport to authorize said commission to regulate, interfere with or otherwise affect such sale and delivery, such statutes as so construed are unconstitutional and void because in violation of Article 1, Section 8 (3) of the Constitution of the United States, and denies:

(a) that it sells natural gas in Indiana except as a part of interstate commerce;

(b) that it is engaged in intrastate commerce in the State of Indiana;

(c) that it has transacted or is transacting within the State of Indiana any business as a public utility within said state;

[fol. 55] (d) that the sale and delivery of natural gas transported by it in interstate commerce directly to an industrial consumer is subject to the jurisdiction of the Public Service Commission of Indiana;

(e) that it is in any manner subject to the jurisdiction of said commission;

(f) that said commission has any right, power or authority to institute this proceeding against it;

(g) that the statutory provisions under which this action is instituted (Secs. 54-112, et seq. Burns Indiana Statutes Annotated, 1933) authorizing investigation by said commission of matters relating to any public utility, have any application to it or its business;

(h) that it is under any obligation to comply with any Indiana statute or any order of said commission relating to public utilities within the State of Indiana; and

(i) that its business or any part thereof is subject to regulation of any character by said commission.

II

It is agreed by and between the parties to this stipulation that by entering into this stipulation as to the facts relating to the various matters specified in the order approved by the Public Service Commission of Indiana on October 13, 1944, Panhandle Eastern Pipe Line Company does not concede and will not be charged with having conceded any of the matters herein above asserted or denied by it.

III

It is further agreed by said parties that each party hereto reserves the right to introduce further evidence herein, including evidence to supplement and explain, but not to contradict, the facts herein stipulated.

IV

It is further agreed between the parties hereto (i) that by the making of this stipulation of facts no party hereto waives any objection it may have to the relevancy or materiality of any fact herein stipulated, or its right to take and preserve an exception to any ruling by the Public Service Commission of Indiana on any objection by [fol. 56] such party to the relevancy or materiality of such fact, and (ii) that any party hereto who has any objection or objections to the relevancy or materiality of any fact or facts stated in this stipulation shall make such objection or objections in writing filed with said Commission in this cause at the time of filing this stipulation, and any such objection not so taken shall be deemed to have been waived.

V

Subject to the foregoing agreements, it is hereby agreed by and between the parties hereto that this stipulation, when introduced in evidence in this cause, shall have the same force and effect as though the matters hereinafter set forth in Division VI had been proved by competent evidence on a hearing in this cause.

VI

The facts, herein stipulated subject to the foregoing agreements, are as follows:

1. Panhandle Eastern Pipe Line Company (hereinafter called "Panhandle") is a corporation organized under the laws of the State of Delaware on December 23, 1929 under the name of "Interstate Pipe Line Company." On May 9, 1930 said initial name was lawfully changed to "Panhandle Eastern Pipe Line Company." On May 29, 1930 and upon application made by Panhandle pursuant to the provisions of Section 59 of The Indiana General Corporation Act, a Certificate of Admission to transact business in the State of Indiana was issued by the Secretary of State of Indiana to Panhandle, a copy of which certificate is attached to this stipulation as "Exhibit A" and is hereby made a part hereof. On or about April 13, 1933 the said authority of Panhandle to transact business in Indiana was revoked by the State because of the failure of Panhandle to file annual reports for the years 1931 and 1932 with the [fol. 57] Secretary of State of Indiana, as required by the applicable statutes of Indiana. On September 19, 1935, and upon application made by Panhandle pursuant to said Section 59, a Certificate of Admission to transact business in the State of Indiana was issued by the Secretary of State of Indiana to Panhandle, a copy of which certificate is attached to this stipulation as "Exhibit B" and is hereby made a part hereof. Said last mentioned Certificate of Admission is still in force and effect.

2. The principal executive offices of Panhandle are located at 1221 Baltimore Avenue, Kansas City 6, Missouri and 135 South LaSalle Street, Chicago 3, Illinois. The present statutory office of Panhandle in Indiana is 601 Illinois Building, 17 West Market Street, Indianapolis 4, Marion County, Indiana. None of the books and records of Panhandle are or have at any time been kept at said statutory office in Indiana or at any other office or place in Indiana. All of the books of account and records of Panhandle pertaining to its business are kept and maintained at one or the other of its aforesaid principal executive offices. All of the operations and business of Panhandle, including its operations and business in the State of Indiana, are directed, managed and controlled from the aforesaid principal executive offices.

3. Panhandle is engaged principally in the production, purchase, transmission and sale of natural gas. Its main transmission line extends approximately 1,160 miles from the Amarillo Gas Field in the Texas Panhandle and the Hugoton Gas Field in southwestern Kansas through the States of Oklahoma, Kansas, Missouri, Illinois, Indiana and the northwest corner of Ohio into the State of Michigan to a point near Detroit. Said main transmission line and appurtenant facilities of Panhandle as presently constituted, consist of 22-inch, 24-inch and 26-inch transmission mains (there being, as a result of the completion of Panhandle's [fol. 58] 1943 construction program, an additional continuous parallel main from a point near Liberal, Kansas to a point 68.8 miles northeast of Zionsville, Indiana, and from a point near Edgerton, Indiana to a point in Ohio 18.2 miles northeast of said Edgerton), dehydration plants, gasoline plant, compressor stations and related facilities incidental to the transmission and delivery of such natural gas. From said main transmission line, lateral or branch lines of varying sizes and lengths extend to interconnections with gas lines of various distributing companies or to industrial plants. Said gas fields and transmission line system are shown on the map which is attached to this stipulation as "Exhibit C" and is hereby made a part hereof.

4. The portion of the present transmission line system that Panhandle originally owned and operated (such portion being hereinafter called the "Original Panhandle Line") is the portion (shown in green on said "Exhibit C") extending from such gas fields to a point near Dana, Indiana. The Original Panhandle Line was placed in practical operation in the early part of 1932.

5. In 1932, the eastern end of the Original Panhandle Line was interconnected, near Dana, Indiana, with a natural gas transmission system which, as extended in 1936 from Zionsville, Indiana, extends from said interconnection at Dana to Detroit, Michigan, and was constructed by Indiana Gas Transmission Corporation (hereinafter called "Indiana Transmission"), a Delaware corporation, and by Michigan Gas Transmission Corporation (hereinafter called "Michigan Gas"), a Delaware corporation (into which Indiana Transmission was merged on March 4, 1936), for the purpose of providing an extension to the Original Panhandle Line and extending as far east as Detroit, Michigan,

the market for the natural gas from the aforesaid Amarillo and Hugoton gas fields. Said system is shown on said "Exhibit C" in blue and is hereinafter called the "Indiana-[fol. 59] Michigan System." The portion of the Indiana-Michigan System, extending from near Dana, Indiana, to Muncie, Indiana, is the portion placed in operation in the early part of 1932; and the portion thereof, extending from Zionsville, Indiana, to Detroit, Michigan, is the portion placed in operation in 1936; and the portion thereof, extending from the Ohio-Michigan State Line to Saginaw, Michigan, and Kalamazoo, Michigan, is the portion consisting of extensions made since Panhandle acquired in 1942 the Indiana-Michigan System. The Indiana-Michigan System, as in existence at the time of its acquisition by Panhandle, was acquired by Panhandle as hereinafter set forth in paragraph numbered 6 hereof. A true copy of the Findings made and Opinion given by the Securities and Exchange Commission in connection with an order entered by said commission on May 27, 1941 in "In the Matter of Panhandle Eastern Pipe Line Company, File Nos. 31-109, 31-493, 31-108, Columbia Oil & Gasoline Corporation, File Nos. 31-107, 31-106, Columbia Gas & Electric Corporation, File Nos. 31-422, 31-423, Public Utility Holding Company Act of 1933—Section 2(a)(8)" is attached to this stipulation as "Exhibit D" and is hereby made a part hereof, as showing only what the Securities and Exchange Commission found on the evidence before it.

6. On February 6, 1942 Panhandle purchased from Columbia Gas & Electric Corporation, a Delaware Corporation, the then owner thereof, all the outstanding capital stock and securities of Michigan Gas. On March 31, 1943, Panhandle caused Michigan Gas to be liquidated and in such liquidation acquired the properties constituting the Indiana-Michigan System.

7. On February 6, 1942, Panhandle purchased the inter-connecting gas transmission lines which are shown in red on said "Exhibit C", from The Ohio Fuel Company (hereinafter called "Ohio Fuel") an Ohio corporation whose entire capital stock was and had been since prior to 1931 [fol. 60] owned by said Columbia Gas & Electric Corporation or an affiliate thereof.

8. On December 18, 1931 and upon application made by Indiana Transmission pursuant to the provisions of Section 59 of The Indiana General Corporation Act, a Certificate of Admission to transact business in the State of Indiana was issued by the Secretary of State of Indiana to Indiana Transmission, a copy of which certificate is attached to this stipulation as "Exhibit E" and is hereby made a part hereof. Said Certificate of Admission continued to be in force and effect until the merger of Indiana Transmission into Michigan Gas on March 4, 1936. On March 31, 1936 upon application made by Michigan Gas pursuant to the provisions of Section 59 of The Indiana General Corporation Act, a Certificate of Admission to transact business in the State of Indiana was issued by the Secretary of State of Indiana to Michigan Gas, a copy of which certificate is attached to this stipulation as "Exhibit F" and is hereby made a part hereof.

9. Between the date of the interconnection of the Original Panhandle Line and the Indiana Michigan System and March 4, 1936, Panhandle (except in emergencies, in which cases gas was obtained from Ohio Fuel) supplied to Indiana Transmission all of the gas which Indiana Transmission was reselling to distributing utilities from the Indiana-Michigan System for resale by them to residential, commercial and industrial consumers in Indiana and Michigan. Said natural gas was supplied by Panhandle under an informal arrangement as shown by communications, dated November 19, 1931, from Columbia Oil and Gasoline Corporation to United Light & Power Company and from Panhandle Corporation to United Light & Power Company, approved by Panhandle's Board of Directors at its meeting held January 19, 1932, true copies of which are attached to this stipulation as "Exhibits G-1, G-2, and G-3," and are hereby made a part hereof.

[fol. 61] 10. Between said date of March 4, 1936 and the date of the acquisition by Panhandle of the Indiana-Michigan System, Panhandle (except in emergencies, in which cases gas was obtained from Ohio Fuel) (i) supplied to Michigan Gas all of the gas which Michigan Gas was reselling to distributing utilities from the Indiana-Michigan System for resale by them to residential, commercial and industrial consumers in Indiana, Ohio and Michigan, and (ii) delivered to Michigan Gas such amounts of gas as

Panhandle desired to have transported for Panhandle's account (a) for sale by Panhandle to distributing utilities in Indiana, Ohio and Michigan which resold such gas to residential, commercial and industrial consumers, and (b) during the period between May 11, 1942 and March 31, 1943 for sale by Panhandle directly to Anchor-Hocking Glass Company (said company and its predecessors being hereinafter called "Anchor-Hocking"). Prior to July 31, 1936 said natural gas was supplied and delivered to Michigan Gas by Panhandle under the aforesaid contracts with Indiana Transmission (Exhibits G-1, G-2 and G-3). After July 31, 1936 said natural gas was supplied and delivered by Panhandle under four principal contracts (and the supplemental agreements thereto) between Panhandle and Michigan Gas (hereinafter collectively referred to as the "Panhandle-Michigan Gas Contracts") dated respectively March 17, 1936, July 31, 1936, August 1, 1936, and October 1, 1936, true copies of which principal contracts (and the respective supplemental agreements thereto) are attached to this stipulation as "Exhibits G-4, G-5, G-6 and G-7," respectively, and are hereby made a part hereof. Although the said contracts dated July 31, 1936 and August 1, 1936 by their terms expired five years from date, these contracts were each continued in effect, without formal extension, until March 31, 1943. Since the acquisition by Panhandle of [fol. 62] the properties constituting the Indiana-Michigan System, Panhandle has sold directly to the public utility companies formerly served by Michigan Gas natural gas for resale and distribution by them. In the case of the gas supply for the Detroit, Michigan, area the contract for the supply of gas to the public utility company reselling the same in that area was made by Panhandle itself at a date prior to the commencement of the extension from Zionsville, Indiana, to Detroit, Michigan. Contracts with Indiana distributing public utility companies included those dated respectively September 27, 1937, May 1, 1937, and October 1, 1936, with the intervenors Kokomo Gas and Fuel Company (hereinafter called "Kokomo Company") and Northern Indiana Public Service Company and with Public Service Company of Indiana (to which latter company the intervenor Public Service Company of Indiana, Inc. (hereinafter called "Service Company") is successor by consolidation). Copies of said contracts (and the respective supplemental agreements thereto) are attached hereto as "Exhibits H-1,

H-2 and H-3", respectively, and are hereby made a part hereof.

11. Special individual contracts were made from time to time for the sale and delivery of natural gas on an interruptible basis to large industrial consumers. During the time that Michigan Gas owned the properties constituting the Indiana-Michigan System, the contracts appertaining to each such supply of gas generally consisted of (i) the applicable contract between Panhandle and Michigan Gas being either "Exhibit G-5" or "Exhibit G-6" as the case might be, (ii) a contract between Michigan Gas and the Indiana distributing utility under which the natural gas was obtained by the distributing utility and (iii) a contract between the distributing utility and the industrial consumer. [fol. 63] Illustrative of the agreements relating to this class of consumers are those for the supply of natural gas on an interruptible basis to the Mid-States Steel and Wire Company for use by that company at its plant at Crawfordsville, Indiana. Copies of the contracts between Michigan Gas and Service Company, and between Service Company and Mid-States Steel and Wire Company, and of the notification by Michigan Gas to Panhandle thereof (said notice being given pursuant to the requirements of Section 2, of Article II, of Exhibit G-6) are attached to this stipulation as "Exhibits I-1, I-2, and I-3", respectively, and are hereby made a part hereof. On March 31, 1943 Panhandle succeeded to all the rights and property of Michigan Gas, including the rights and obligations of Michigan Gas under all the contracts of the character referred to in subdivision (ii) of the second sentence of this paragraph numbered 11. For the twelve-month period ending September 30, 1944, the amounts in thousands of cubic feet (MCF), of gas purchased by the intervenors from Panhandle and resold by them to industrial consumers, and the revenues derived by the intervenors therefrom were as follows:

Company	MCF Sales	Revenue
Central Indiana Gas Company (hereinafter called "Central Gas")	9,004,962	\$2,624,557.81
Kokomo Company	480,406	196,241.70
Northern Indiana Public Service Company	940,340	545,940.00
Service Company	1,978,605	812,631.80

12. Panhandle sells in Indiana the natural gas transported there by it (i) to other gas companies which dis-

tribute such gas to residential, commercial, and industrial consumers served by them, and (ii) to one industrial consumer (Anchor-Hocking) served directly by Panhandle. Panhandle has recently completed negotiations with and [fol. 64] has entered into a contract to supply natural gas to E. I. DuPont De Nemours & Company at and for use in the operation of its plant, commonly known as its "Grasselli Chemical Company Plant", which is located adjacent to the town of Fortville, Indiana. A copy of said contract is attached hereto as "Exhibit J-1" and is hereby made a part hereof. There is now pending before the Federal Power Commission as Docket G607 an application pursuant to Section 7(c) of the Natural Gas Act for a certificate of convenience and necessity, a copy of which application is attached hereto as "Exhibit J-2" and is hereby made a part hereof. Panhandle does not sell in Indiana any gas to residential and commercial consumers as such. It does supply for a moderate charge gas for residential purposes to several of its employees who live in company owned houses located on Panhandle's property. In other states traversed by Panhandle's pipe lines obligations to supply residential gas were assumed as part consideration for rights of way and similar arrangements for supplying gas to Panhandle's employees living on Panhandle's property were made, as a result of which, throughout its entire system, Panhandle is now rendering service of such character to approximately 194 persons. The revenue therefrom for the year ended December 31, 1943, amounted to \$12,220.49 for the entire system. During the same year revenue from direct industrial sales for the entire system amounted to \$1,559,195.24 and revenue from sales to other gas companies for resale amounted to \$22,072,005.40. Current sales are being made in approximately the same proportions.

13. Approximately 950,000 consumers are supplied directly or indirectly with gas from the system of Panhandle, including more than 112,000 consumers in Indiana. The number of industrial consumers served directly by Panhandle were 21 in 1943 and are 23 at the present time. The names of such consumers, the locations of their plants at which natural gas is supplied by Panhandle, and the years in which direct services of natural gas by Panhandle to such plants commenced (and in cases where direct service was

[fol. 65] given by a subsidiary of Panhandle, also the years in which such service commenced and the names of such subsidiaries), are respectively, as follows:

Name of Consumer	Location of Plant	Year Direct Service Commenced and Name of Subsidiary
Magnolia Petroleum Co., et al	Pratt, Kansas	1944
Phillips Petroleum Co.	Paola and Sharpe, Kansas	1935
John Freiling	Hannibal, Missouri	1933
Harbison-Walker Refractories Co.	Fulton and Vandalia, Mo.	1931
Hercules Powder Co.	Louisiana, Missouri	1942
Independent Gravel Co.	Hannibal, Missouri	1942
Mexico Refractories Co.	Mexico, Missouri	1931
Missouri Power and Light Co.	Jefferson City and Mexico, Mo.	1931
Pratt and Whitney Aircraft Co. of Missouri	Kansas City, Missouri	1943
Phillips Petroleum Co.	Harrisonville, Jefferson City, and Leeton, Missouri	1935
The W. J. Small Co., Inc.	Booneville, Liberty and Helton, Missouri	1944
United Brick and Tile Co.	Vale, Missouri	1931
Universal Atlas Cement Co.	Hannibal, Missouri	1933
Walsh Refractories Corp.	Vandalia, Missouri	1931
Wellsville Fire-Brick Co.	Wellsville, Missouri	1932
Black-White Lime Co.	Quincy, Illinois	1933
General Motors Corp.—Saginaw Malleable Iron Division—Plant 2	Tilton, Illinois	1944
The Hegler Zinc Co.	Danville, Illinois	1943
Marblehead Lime Co.	Marblehead and Quincy, Ill.	1935
Menke Stone and Lime Co.	Quincy, Illinois	1933
Anchor Hocking Glass Corp.	Winchester, Indiana	1942
Albion Malleable Iron Co.	Albion, Michigan	1944
Michigan Seamless Tube Co.	South Lyon, Michigan	1943

*Service by Panhandle Illinois Pipe Line Company, a 100% owned subsidiary of Panhandle, from date shown to 1938, and by Illinois Natural Gas Company, a 100% owned subsidiary of Panhandle, from 1938 to March 1943.

Anchor-Hocking, which has a glass factory located near Winchester, Indiana, is the only industrial consumer in Indiana which Panhandle now serves or has heretofore served directly.

14. Anchor-Hocking is and has been for many years a principal American manufacturer of inexpensive machine [fol. 66] made glass tableware and is the third largest manufacturer and distributor of glass containers in the United States. The products manufactured by it are sold by it principally in interstate commerce. Its business is subject to applicable federal regulatory statutes. Its plant at Winchester, Indiana is one of its large manufacturing plants, but its general office is located at Lancaster, Ohio. The natural gas purchased from Panhandle for use at the

Winchester plant of Anchor-Hocking is used in the manufacture of products produced there.

15. Central Gas serves natural gas purchased by it from Panhandle to more than 30 large industrial consumers. Such gas is delivered by Central Gas to such consumers in Indiana and is used by them in their manufacturing plants in Indiana. Nine of such plants so served are large glass plants producing products of the same general character as those manufactured by Anchor-Hocking. The other such plants normally produce various items of automotive, insulating and fencing materials. The products manufactured in Indiana by all said 30 large industrial consumers are sold by them principally in interstate commerce. Said industrial consumers include Hart Glass Division of Armstrong Cork Company, Ball Brothers Company, Foster-Forbes Glass Company, Owens-Illinois Glass Company, Slick Glass Corporation, Sneath Glass Company, The Warfield Company, Sterling Glass Division, Delco-Remy Division of General Motors Corporation, Indiana Steel and Wire Company, Johns-Manville Products Corporation, The National Tile Company and Warner Glass Company.

16. Service Company serves natural gas purchased by it from Panhandle to nine large industrial consumers. Such gas is delivered by Service Company to such consumers in Indiana and is used by them in their manufacturing plants in Indiana. At said plants such consumers normally produce aluminum extrusion products, automotive products, stainless steel, steel springs, galvanized [fol. 67] fencing, armor plate, mechanical gears and enamelware. The products manufactured in Indiana by all said large industrial consumers are sold by them principally in interstate commerce. Said industrial consumers include Aluminum Company of America, Chrysler Corporation, Ingersoll Steel and Disc Division of Borg-Warner Corporation and Ingram Richardson Company.

17. Kokomo Company serves natural gas purchased by it from Panhandle to six large industrial consumers. Such gas is delivered by Kokomo Company to such consumers in Indiana and is used by them in their manufacturing plants in Indiana. At said plants such consumers normally pro-

duce steel and wire products, automotive accessories and parts, vitreous enamelware, radios, stoves, stokers, miscellaneous metal specialties, and non-ferrous alloys. The products manufactured in Indiana by all such large industrial consumers are sold by them principally in interstate commerce. Said industrial consumers are Continental Steel Corporation, American Radiator and Standard Sanitary Corporation, Haynes-Stellite Company, Kingston Products Corporation, Chrysler Corporation and Globe Stove and Range Company.

18. Northern Indiana Public Service Company serves natural gas purchased by it from Panhandle to 72 large industrial consumers. Such gas is delivered by said company to such consumers in Indiana and is used by them in their manufacturing plants in Indiana. At said plants such consumers normally produce electrical equipment, automotive products, airplane products, heavy truck equipment, insulated wire and miscellaneous steel products. The products manufactured in Indiana by all said large industrial consumers are sold by them principally in interstate commerce. Said industrial consumers include General Electric Company, International Harvester Company, Studebaker Corporation and Phelps-Dodge Corporation.

19. Panhandle, in Indiana, sells natural gas to Kentucky Natural Gas Corporation, a Delaware corporation, which company resells all or the principal part of such natural gas to companies distributing, as public utilities, natural gas to residential, commercial and industrial consumers in Indiana. Panhandle, in Indiana, also sells natural gas to the following companies or municipal corporations, which are public utilities or municipalities distributing such gas to residential, commercial and industrial consumers in Indiana, to-wit: Central Gas, Greenfield Gas, Indiana Gas Distribution Corporation, Indiana-Ohio Public Service Company, Kokomo Company, Lynn Natural Gas Company, Northern Indiana Public Service Company, Pendleton Natural Gas Company, Service Company, Richmond Gas Corporation, Town of Lapel, Town of Montezuma, Town of Pittsboro, and Town of Roachdale. The number and classi-

ification of gas consumers served by such gas from Panhandle are approximately as follows:

Name of Company	Approximate Number of Customers Served				
	Residential	Commercial	Industrial	Other	Total
Central Gas	31,384	1,322	103		32,809
Greenfield Gas Co., Inc.	1,296	59	2	4	1,361
Indiana Gas Distribution Corp.					2,070
Indiana-Ohio Public Service Co.	3,314	219	11		3,544*
Kokomo Co.	6,674	379	23		7,076
Lynn Natural Gas Co.	265	28			293
Northern Indiana Public Service Co. (Ft. Wayne District)	31,633	1,160	67	68	32,928
Pendleton Natural Gas Co.	617	39			656
[fol. 69]					
Service Company	22,516	1,916	46	120	24,598
Richmond Gas Company					6,800*
Town of Lapel					250*
Town of Montezuma					100*
Town of Pittsboro					116*
Town of Roachdale					92
Total	97,692	5,122	252	192	112,693
* Number of meters.					

20. Deliveries of natural gas by Panhandle directly to industrial customers using large quantities of gas, and to other gas companies for resale to industrial customers using large quantities of gas, are, in most instances, subject to curtailment, interruption or discontinuance in the event of an insufficiency in the supply of gas.

21. On April 20, 1931, said Indiana Gas Distribution Corporation (hereinafter called "Indiana Gas") was organized under The Indiana General Corporation Act by said Columbia Gas & Electric Corporation. Indiana Gas constructed or acquired gas distribution facilities in Indiana along the Indiana-Michigan System. It operated and now operates as a public utility in distributing natural gas directly to Indiana consumers. Since 1932 substantially all the natural gas distributed by Indiana Gas has been supplied directly or indirectly by Panhandle. At the time of the purchase by Panhandle of the stock and securities of Michigan Gas, Panhandle also purchased the stock and indebtedness of Indiana Gas. Indiana Gas (i) was at said time, and had been since natural gas became available in the Indiana-Michigan System, distributing natural gas to about 2,000 residential and commercial consumers, and (ii) was at said time distributing natural gas to one industrial [fol. 70] consumer, to-wit, Anchor-Hocking, whose plant to

which gas service was supplied is located near Winchester, Indiana, and had been supplying natural gas continuously to such industrial consumer since about April 22, 1931, when such consumer first commenced the extensive use of natural gas as a fuel at its said plant. From 1936 to August 1, 1941 the natural gas which Indiana Gas sold to Anchor-Hocking was supplied it by Michigan Gas which obtained such natural gas under the contract included herein as "Exhibit G-6". A copy of the agreement, dated August 1, 1940, under which Michigan Gas last sold such gas to Indiana Gas is attached hereto as "Exhibit K" and hereby made a part hereof. The preceding agreements covering such sales were similar in form. A copy of the agreement, dated August 1, 1940, under which Indiana Gas last supplied such gas to Anchor-Hocking is attached hereto as "Exhibit L" and hereby made a part hereof. The preceding agreements covering such sales were similar in form. On July 31, 1941, Panhandle entered into an agreement with Indiana Gas providing for the sale and delivery of gas to that company for resale to Anchor-Hocking and, on the same date, entered into an agreement with Michigan Gas to transport such gas for Panhandle's account. These agreements were amended on August 21 and September 17, 1941, respectively, to provide a thirty-day termination clause. Copies of said two agreements and said two supplemental agreements thereto are attached hereto as "Exhibit M" and are hereby made a part hereof. Federal Power Commission took no action on the rates in said contracts between Panhandle and Indiana Gas and be- [fol. 71] tween Panhandle and Michigan Gas, both dated July 31, 1941, when filings thereof were made with that Commission in August 1941; and therefore by reason of a direction which had been received by telegram by Panhandle from that Commission on July 30, 1941, and which notified Panhandle not to terminate the rate schedules based on said contracts of July 31, 1936 and August 1, 1936 (Exhibits G-5 and G-6) until further notice from that Commission, Panhandle, Michigan Gas and Indiana Gas never actually put said contracts of July 31, 1941 in effect. The various contractual arrangements between Panhandle, Michigan Gas and Indiana Gas in respect of the supply of gas for Anchor-Hocking that were in effect immediately prior to August 1, 1941 were continued in effect until May 11, 1942, at which time Panhandle commenced selling gas

direct to Anchor-Hocking under an industrial gas contract, dated May 11, 1942, a copy of which is attached hereto as "Exhibit N-1" and is hereby made a part hereof. During the period from May 11, 1942 to March 31, 1943, Michigan Gas transported the gas Panhandle sold to Anchor-Hocking in accordance with the terms of an agreement entered into with Panhandle, dated May 11, 1942, a copy of which is attached hereto as "Exhibit N-2" and is hereby made a part hereof. Said last mentioned agreement (Exhibit N-2) was filed with the Federal Power Commission by Michigan Gas on June 10, 1942; and a copy of the letter from Michigan Gas to said commission, transmitting said agreement for filing, is attached hereto as "Exhibit N-3" and is hereby made a part hereof. On July 8, 1943 the Federal Power Commission notified Panhandle with respect to said matter as follows:

"The Panhandle Eastern Pipe Line Company submitted two agreements dated July 31, 1941 and August 21, 1941 with the Indiana Gas Distribution Corporation for the sale of natural gas for resale to the Anchor-Hocking Glass Corporation at Winchester, Indiana. Since then, your company has started to serve the Anchor-Hocking Glass Company directly. Therefore the agreements of July 31, 1941 and August 21, 1941 are without further significance and no action is necessary in regard thereto."

[fol. 72] On or about July 10, 1942, Panhandle sold the stock of Indiana Gas to Mr. John H. Maxon and Mr. William A. McClellan. Since said sale of stock, Indiana Gas has continued to purchase, and does now purchase, from Panhandle all the natural gas distributed by it.

22. The pressure at which the natural gas is carried in the portion of the main transmission line that crosses Indiana varies from approximately 250 pounds to 600 pounds per square inch. At the various interconnections between the main line and the lateral or branch gas lines in Indiana, the pressure of the gas is reduced to pressures ranging between approximately 200 pounds and 5 pounds per square inch. The necessary regulator facilities for this purpose are owned and operated by Panhandle.

23. Among the lateral or branch gas transmission lines of Panhandle in Indiana is a six-inch lateral or branch

line (hereinafter called the "Winchester line") extending north, a distance of about seven miles, from the sixteen-inch lateral or branch line extending between Muncie, Indiana and a point in Ohio near the Indiana-Ohio State Line. The Winchester line was constructed early in 1931. The said sixteen-inch line and the Winchester line were a part of the natural gas lines and facilities which, as set forth in paragraph numbered 7 hereof, Panhandle purchased from Ohio Fuel on February 6, 1942.

24. The pressure in said sixteen-inch line is normally carried at approximately 200 pounds per square inch. At or adjacent to the point where the natural gas is taken into the Winchester line from said sixteen-inch line, the pressure [fol. 73] of such gas in the Winchester line is, by means of a regulator which is owned and operated by Panhandle, reduced to approximately 100 pounds per square inch. The gas in the Winchester line is sold by Panhandle (i) to Anchor-Hocking for its own use at its said industrial plant near Winchester, and (ii) to Indiana-Ohio Public Service Company for resale to consumers in and adjacent to Winchester, Portland and Union City in Indiana and Union City in Ohio. Adjacent to the northeast corner of the corporate limits of the Town of Winchester, Indiana, Panhandle has two meter houses located approximately 400 feet apart, both of which houses are located on plant property of Anchor-Hocking (owned prior to April 6, 1931 by Turner Glass Company). In one of these houses, are the regulators and meters used in connection with deliveries to Anchor-Hocking. In the other are the regulators and meters used in connection with deliveries to the Indiana-Ohio Public Service Company. A branch of the Winchester line runs directly into the meter house serving Anchor-Hocking. Another branch of the Winchester line runs directly into the meter house serving said Indiana-Ohio Public Service Company. Gas enters both meter houses at the same pressure, which (by reason of the natural fall in pressure occurring in the Winchester line between these points and the main line) is about 80 pounds per square inch. At the Anchor-Hocking meter house the gas passes first through a regulator which reduces the pressure to approximately 40 pounds per square inch. The gas then passes through two orifice meters into a header. From this header a four inch service line carries the gas into the

glass plant at the metering pressure (40 pounds per square inch). From this header gas also passes into another [fol. 74] regulator in the meter house which reduces the gas to a pressure of approximately 10 pounds per square inch. From this regulator the gas at such pressure passes through a ten-inch line directly into the glass plant. Anchor-Hocking takes possession of all the gas delivered to it at the outlet side of Panhandle's meter house (designated in the contract as "measuring station"). All the facilities (other than the real estate itself) up to the said point at which Anchor-Hocking takes possession of said gas are owned and operated by Panhandle. Anchor-Hocking maintains within its own plant other regulators whereby it further reduces the pressure of the gas received in the four inch line and in the ten-inch line after it has accepted delivery thereof from Panhandle. At the meter house serving Indiana-Ohio Public Service Company the gas passes first through a regulator which reduces the pressure to a pressure which is maintained at approximately 9 pounds per square inch in the summer and approximately 25 pounds per square inch in the winter. From this regulator the gas passes through two orifice meters into a header from which it passes through a pipe which connected with a four inch line owned by Indiana-Ohio Public Service Company. Indiana-Ohio Public Service Company maintains on its own system other regulators whereby the pressure of the gas is further reduced. Indiana-Ohio Public Service Company takes possession of all the gas delivered to it at the outlet side of Panhandle's meter-house (designated in the contract as "measuring station"). All of the facilities (other than the real estate itself) up to the said point at which Indiana-Ohio Public Service Company takes possession of said gas are owned and operated by Panhandle. In making deliveries of gas to distributing companies generally over its system, Panhandle maintains regulators at its town border metering [fol. 75] stations and, before delivery of the gas, reduce the pressure thereof to such pressure as the distributing company desires to meet operating conditions on the system of the distributing company. Until Michigan Gas commenced the sale of natural gas to Indiana-Ohio Public Service Company in November 1934 no gas transported through the Winchester line was sold to any person, firm

or corporation except gas sold to Indiana Gas for resale to Anchor-Hocking.

25. In 1943, Panhandle sold 1,150,279 cubic feet of natural gas to Anchor-Hocking and 151,065 cubic feet of natural gas to Indiana-Ohio Public Service Company.

26. Prior to February 6, 1942, when Panhandle acquired the properties of Ohio Fuel, as stated in paragraph numbered 7 hereof, the regulators and meters which were in the said regulator station adjacent to Winchester, Indiana were owned by Ohio Fuel.

27. On June 11, 1929 Ohio Fuel was admitted to do business in the State of Indiana. A copy of its Certificate of Admission is attached to this stipulation as "Exhibit O" and is hereby made a part hereof. Said Certificate of Admission has been continuously in force and effect since June 11, 1929. The Winchester line is located in part on certain public county highways in Randolph County and pursuant to authority granted by the Board of County Commissioners of said County by resolution dated April 23, 1931, and recorded in the Commissioners' Record No. 23, page 106, Randolph County Records. A copy of the records of said Board granting said authority is attached hereto as "Exhibit P", and is hereby made a part hereof.

[fol. 76] 28. No franchise authorizing the sale or delivery of natural gas under said contract, dated May 11, 1942, between Panhandle and Anchor-Hocking has been acquired by Panhandle from the State of Indiana or any agency thereof or is claimed by Panhandle to have been acquired. The Prospectus, dated July 12, 1944, issued by Panhandle in connection with the registration under the Securities Act of 1933, and the sale, of shares of the common stock of Panhandle (Registration File No. 2-5390 before the Securities and Exchange Commission), contains the following statements (i) "The Company holds its charter powers from the State of Delaware and its licenses to transact its business in the States of Texas, Oklahoma, Missouri, Illinois, Indiana, Kansas and Michigan"; and (ii) "In the opinion of counsel for the Company, the Company is not subject to the jurisdiction of any commission or other regulatory body of any State in which its properties are located either (a) with respect to rates, with the possible exception of the States of Kansas and Texas where, in the

opinion of said counsel, the Company transacts some business in intrastate commerce, or (b) with respect to the issuance of securities, with the possible exception of the State of Kansas."

29. Tariffs covering the rates and charges made by Panhandle for all gas sold by it to persons, firms or corporations for resale to ultimate consumers have been filed by Panhandle with the Federal Power Commission pursuant to the requirements of the Natural Gas Act and of the rules and regulations promulgated by said commission under said act; and said tariffs are now on file with said commission and in force and effect.

[fol: 77] 30. On June 10, 1942, Panhandle filed with the Federal Power Commission, in conformity with Section 54.30 of Part 54 of the "Provisional Rules of Practice and Regulations under the Natural Gas Act," as amended by Order No. 81 issued January 21, 1941, its said contract dated May 11, 1942, with Anchor-Hocking. It has not filed with the Public Service Commission of Indiana any tariffs of rates, or any rules or regulations, relating to the sale of natural gas to Anchor-Hocking.

31. All rules, regulations and general orders promulgated by the Federal Power Commission under the Natural Gas Act may, without their incorporation herein, be considered by the Public Service Commission of Indiana the same as though incorporated in this stipulation.

32. Panhandle has at no time filed with the Public Service Commission of Indiana any annual report or any other periodic report.

33. Panhandle has at no time filed with the Public Service Commission of Indiana an original cost report appertaining to any portion of its property in Indiana.

34. Panhandle has not purported to keep books, accounts, papers or records in the manner required under the orders and directions of the Public Service Commission of Indiana for public utilities subject to the jurisdiction thereof. Panhandle in keeping its books, accounts, papers and records is subject to the rules and regulations of the Federal Power Commission.

35. Under date of May 15, 1939, Mr. G. J. Neuner, then vice-president in charge of operations of Panhandle, wrote

to Mr. J. D. Creveling, then president of Panhandle, a letter relative to the natural gas service to Anchor-Hocking, which letter is as follows:

[fol. 78] "PANHANDLE EASTERN PIPE LINE COMPANY

101 West Eleventh Street,

Kansas City, Mo.

May 15, 1939

"J. D. Creveling, President; Panhandle Eastern Pipe Line Company, Ninety Broad Street, New York, New York.

"DEAR JOE:

"Some time ago you suggested that we prepare for your information a memoranda history of sales and deliveries of gas to Anchor-Hocking Glass Company (formerly General Glass Corporation) at Winchester, Indiana. Since that time I have had some conversations with you as well as with Mr. Goodwin, and as I recall we came to the conclusion that you and Mr. Goodwin already have the required information with respect to deliveries since August 1, 1936, the date of the industrial gas contract between Panhandle Eastern Pipe Line Company and Michigan Gas Transmission Corporation.

"As you know, all sales of gas prior to August 1, 1936, to Michigan Gas Transmission Corporation for resale in Indiana were made at a flat price of 18¢ per MCF. We have no accurate record in this office as to the disposition made of this gas by Michigan Gas Transmission Corporation prior to that date, and we do not definitely know whether sales prior to August 1, 1936 to Anchor-Hocking Glass Company were made through the instrumentality of Indiana Gas Distribution Corporation except insofar as copies of documents in our file would appear to reflect the fact that these sales were, from the beginning, made through that company. For example, we have in our files a conformed copy of an agreement dated November 1, 1935, between Indiana Gas Distribution Corporation, as Seller, and General Glass Corporation, as Buyer, cov-

ering the fuel requirements of the Buyer for glass melting, refining, and finishing at Buyer's plant located at Winchester, Indiana. The term of this agreement is stated to be three years, beginning with the meter reading on November 15, 1935, and ending with the meter reading on November 15, 1938. This particular contract contains a recital as follows:

'That, Whereas, Seller is furnishing and delivering to Buyer, and Buyer is taking and purchasing from Seller, all natural gas required as total fuel requirements for all glass melting, refining, and finishing operations at Buyer's plant located at Winchester, Indiana, under the terms and provisions of a contract entered into under date of April 22, 1931.'

This recital would seem to indicate that Indiana Gas Distribution Corporation has been serving this glass [fol. 79] plant since April 22, 1931.

"According to our information, Michigan Gas Transmission Corporation's license to do business in Indiana permits it to sell gas in Indiana for resale only. It is my understanding that Michigan Gas Transmission Corporation did not qualify to sell gas to consumers directly because it was deemed desirable to avoid regulation by the Indiana commission. Incidentally, the license of Panhandle Eastern Pipe Line Company in the State of Indiana is of like effect, and under present conditions, Panhandle Eastern Pipe Line Company is not authorized to make direct sales in that state. I have asked Mr. Clark to investigate the statutes of Indiana to determine whether or not a foreign corporation such as Panhandle Eastern Pipe Line Company and Michigan Gas Transmission Corporation could qualify and obtain the necessary authority to make direct sales in Indiana. A copy of Mr. Clark's letter to me on this subject is attached for your information. You will note that Mr. Clark concludes that so far as he is able to determine there are no restrictive provisions in the Indiana statutes which would prevent a foreign corporation from so qualifying in Indiana as to obtain the right to make direct sales to customers in that state.

Yours very truly, G. J. Neuner."

The said letter from Mr. Glenn W. Clark, who was then head of Panhandle's legal department, to Mr. G. J. Neuner, is as follows:

May 16, 1939

"Mr. G. J. Neuner

"Mr. Glenn W. Clark

"In accordance with your request, I have examined the Statutes of the State of Indiana to determine whether or not there is any restriction therein which would prohibit a foreign corporation from qualifying to make direct sales of natural gas. I have found no such restriction and I am of the opinion that any foreign corporation having a broad enough charter to allow it to engage in the business of making direct sales of natural gas could qualify to do so in the State of Indiana.

Very truly yours, (Signed) Glenn Clark."

GWC:m.

36. Each of the intervenors in this clause has filed with the Public Service Commission of Indiana sworn annual [fol. 80] reports for the years 1942 and 1943, as provided for by the Public Service Commission Act of the State of Indiana.

37. In the Registration Statement of Panhandle, which was filed by it with the Securities and Exchange Commission in connection with the registration under the Securities Act of 1933, and the sale, of \$10,000,000 principal amount of Panhandle's "First Mortgage and First Lien 3% Bonds, Series C, due January 1, 1962." Registration File No. 2-4919) and which became effective on January 12, 1942, Panhandle, in its answer to Item 41 relative to material contracts stated:

"The Company" (Panhandle) "had an agreement dated August 1, 1936 with Michigan Gas Transmission Corporation for the sale by the Company to it of natural gas for resale to distribution companies for resale in turn to special industrial customers in Indiana. This contract terminated by its terms at the end of five years and in May, 1941 the Company gave notice thereof to the Federal Power Commission. The Federal Power Commission notified the Company by tele-

gram on July 30, 1941 not to cancel the pertinent rate schedules until further direction of the Commission. Consequently, since that time, the Company has continued to sell natural gas to the Transmission Corporation at the same rates as provided in the expired contract, although the Company does not consider the contract to be any longer in effect. The Company proposes to make arrangements for selling the gas direct to such distribution companies."

38. The minutes of a special meeting of the board of directors of Panhandle, held March 11, 1941, contain the following:

"Excerpt from Minutes of a Special Meeting of the Board of Directors of Panhandle Eastern Pipe Line Company

March 11, 1941

Future Development

The Chairman then referred to his previous progress reports as to future development made at intervals during the last two years and made an oral report of discussions had with Consumers Power Company and Dow Chemical Company with respect to potential new markets in the State of Michigan. He stated that discussions and negotiations had with these two organizations had progressed to a point where Consumers Power Company had expressed a desire to arrange [fol. 81] with this Company for the purchase of a supply of gas for resale in Pontiac and Flint, Michigan, and that they might later be interested in the purchase of firm gas for resale in Jackson and Kalamazoo, Michigan, or for a floating dump load gas for fuel at certain of their generating stations. He stated further that an agreement had been reached with Dow Chemical Company for the sale of dump or floating load gas to that organization but that it was his judgment that sales to Dow Chemical Company might better await the general development of the Consumers Power Company markets in Michigan.

"After considerable discussion of these potential new markets, the Chairman stated that it was his opinion that if the Company desired to secure the

and imposed and which Seller is not required by law to collect from Buyer, the amount of such increased tax shall be added to the price to be paid by Buyer to Seller hereunder; provided, however, that in the event the amount of such additional tax, in the judgment of Buyer, shall operate to make the price of gas prohibitive to Buyer, then Buyer shall have the right and privilege of canceling and terminating this contract, and thereupon all obligations and liabilities of the parties hereunder shall cease, unless Seller shall notify Buyer in writing of its election to assume and pay such additional tax; provided, further, that such cancellation and termination shall not affect Buyer's obligation to pay for all gas theretofore delivered by Seller.

5. In the event Buyer shall fail to pay any bill, for gas delivered hereunder, within the time herein provided, Seller, in addition to any other remedy it may have, may, at its option, cancel and terminate this contract, provided that, such cancellation and termination shall not affect Buyer's obligation to pay for all gas theretofore delivered by Seller.

6. Seller agrees that the gas delivered hereunder shall be merchantable, and that the average total heating value of the gas, delivered in any one day, shall not be less than nine hundred fifty (950) nor more than one thousand fifty (1,050) British thermal units per cubic foot.

7. The unit of the gas delivered hereunder shall be the therm, consisting of one hundred thousand (100,000) British thermal units.

8. The number of therms delivered shall be determined by multiplying the number of cubic feet of gas delivered, measured on the measurement basis hereinafter specified and corrected to saturated conditions, by the total heating value of such gas in British thermal units per cubic foot and by dividing the product by one hundred thousand (100,000).

9. The measurement of volume and the determination of total heating value of gas delivered hereunder shall be made in the following manner:

(a) The unit of volume, for the purpose of measurement and for the determination of total heating value, shall be one (1) cubic foot of gas, saturated with water vapor, at a temperature of sixty (60) degrees Fahrenheit.

heit and an absolute pressure equivalent to that of thirty (30) inches of mercury at thirty-two (32) degrees Fahrenheit.

(b) The average absolute atmospheric pressure shall be assumed to be fourteen and four-tenths (14.4) pounds to the square inch, irrespective of actual elevation or location of the point of delivery above sea level or variations in such atmospheric pressure from time to time.

(c) The temperature of the gas flowing through the meters shall be assumed to be sixty (60) degrees Fahrenheit. Provided, however, Seller may, at its option, install a recording thermometer to record the temperature of the gas flowing through the meters, and where such installation is provided, the arithmetic average of the temperature recorded shall be used in computing measurements.

(d) The specific gravity and relative humidity of the gas delivered hereunder shall be determined by approved methods at the beginning of the delivery of gas and thereafter monthly or at such other times as is found expedient in practice.

(e) The deviation of the natural gas from Boyle's Law, at the pressures under which said natural gas is delivered hereunder, shall be determined at intervals of three (3) months or at such other intervals as is found expedient in practice.

(f) The total heating value of the gas delivered hereunder shall be determined by a recording calorimeter located at Seller's Glenarm Compressor Station or at such other place as may agreed upon.

10. The point of delivery of gas delivered hereunder shall be on the outlet side of Seller's measuring station at the point of connection between the facilities of Seller with those of Buyer.

11. Seller agrees to install, maintain and operate at its own expense, at or near the point of delivery, a meter or meters and other necessary measuring equipment to measure the gas delivered hereunder.

Northern Indian and Michigan markets not now served with natural gas it was essential to take immediate steps to occupy these markets as at least two other lines were being actively discussed for the area; that as a matter of fact Natural Gas Pipe Line Company of America, owner of one of the two lines referred to, had let contracts for the first 219 miles of its looping program to be constructed immediately; that the potential markets in the area outlined were sufficient in size to eventually justify two complete lines from the source of supply to the market area; and that no other unoccupied market was so immediately available to the Panhandle system. He stated further that the future expansion policy of this Company was, therefore, a matter that should be given immediate consideration, and that he desired the Board at this time to share with him the responsibility of determining that policy.

"It was the sense of the Board that contracts be worked out promptly with Consumers Power Company for the sale of gas for resale in Pontiac and Flint, Michigan; that such contracts be presented to the Board before or at its next meeting; and that if possible later to negotiate for the sale of natural gas for resale in Jackson and Kalamazoo, Michigan, together with fuel requirements at certain of its generating stations."

39. In the Registration Statement of Panhandle, which was filed by it with the Securities and Exchange Commission in connection with the registration under the Securities Act of 1933, and the sale, of \$24,000,000 principal amount of Panhandle's "First Mortgage and First Lien Bonds, Series A, 4%, due March 1, 1952," and which became effective on March 29, 1937. (Registration File No. 2-2867), Panhandle, in answer to Item 3 'Character of business done, and intended to be done (describe briefly):' stated:

[fol 82]

BUSINESS

"The Issuer, directly and through wholly owned subsidiary companies, is engaged in the production, purchase, transmission and sale of natural gas for domestic, commercial and industrial uses.

"The Issuer and its subsidiary company, Panhandle Illinois Pipe Line Company, operate a natural gas

transmission system extending from the Amarillo gas field in the Texas Panhandle through the States of Oklahoma, Kansas, Missouri and Illinois, to a point near Dana, Indiana, adjacent to the Illinois-Indiana state line. The Issuer produces part of its gas requirements and purchases the remainder under contracts, all as described below under the heading, "Property". The major part of the gas transmitted through the system is sold at wholesale to other gas transmission companies, and to distributing companies for resale; almost all the balance is sold to industrial customers.

"Under a contract dated August 31, 1935 between the Issuer and Detroit City Gas Company (which is not affiliated with the Issuer), providing for the sale of gas by the Issuer to that Company, the Issuer has since July 9, 1936 made and now is making delivery of gas to Michigan Gas Transmission Corporation (a subsidiary of Columbia Gas & Electric Corporation), which, pursuant to a contract with the Issuer dated March 17, 1936, has made and now is making deliveries of gas to Detroit City Gas Company for resale to its customers, numbering approximately 396,000, in Detroit, Michigan. These contracts, which extend for a fixed term of fifteen years, subject to cancellation for cause, are described in paragraphs 5 and 7, respectively of the answer to Item 46, to which reference is hereby made. The Issuer also sells gas to Michigan Gas Transmission Corporation for resale by that company to distributing companies, municipalities, and industrial customers in the State of Indiana.

"In addition to the gas sold as described in the foregoing paragraph, the Issuer and a wholly owned subsidiary sell gas to distributing companies and to approximately ten industrial customers in the states of Kansas, Missouri and Illinois. Deliveries to customers in Illinois are made by Panhandle Illinois Pipe Line Company under rate schedules, rules and regulations on file with the Illinois Commerce Commission. The distributing companies in Missouri, Kansas and Illinois to which gas sales are made serve approximately 118,000 customers (only approximately 3,500 of which are served directly by the Issuer's subsidiary companies). The more important distributing com-

12. Buyer shall have the right to be present at the time of an installing, reading, cleaning, changing, repairing, inspecting, calibrating or adjusting done in connection with Seller's measuring equipment used in measuring deliveries hereunder. The records from such measuring equipment shall remain the property of the Seller, but, upon the request of Buyer, Seller will submit such records and charts, together with calculations therefrom, for Buyer's inspection and verification, subject to return within ten (10) days after receipt thereof.

[fol. 90] 13. The accuracy of Seller's measuring equipment shall be verified by Seller at reasonable intervals, and whenever requested by Buyer, but Seller shall not be required to verify the accuracy of such equipment more frequently than once in any thirty (30) day period.

14. If, upon test, any measuring equipment (including recording calorimeter) is found to be not more than two (2) per cent fast or slow, previous recordings of such equipment shall be considered correct in computing the gas delivered hereunder; but such equipment shall be adjusted properly at once to record accurately. If, upon test, any measuring equipment is found to be inaccurate by an amount exceeding two (2) per cent, at a recording corresponding to the average hourly rate of flow for the period since the last preceding test, then any previous recordings shall be corrected to zero error, for any period which is known definitely or agreed upon, but, in case the period is not known definitely or agreed upon, such correction shall be for a period extending over one-half of the time elapsed since the date of last test, not exceeding a correction period of thirty (30) days.

15. Seller shall be in control and possession of the gas delivered hereunder and responsible for any damage or injury caused thereby, until the same shall have been delivered to Buyer at the point of delivery, after which, Buyer shall be deemed to be in control and possession thereof and responsible for any injury or damage caused thereby.

16. Each party shall indemnify and save harmless the other party on account of any and all damages, claims or actions arising out of the maintenance or operation of the property or equipment of the indemnifying party, the

panies include Central Illinois Electric & Gas Company, Central Illinois Light Company, Central Illinois Public Service Company, Illinois Power & Light Corporation and Missouri Power & Light Company.

"Natural gas is also sold at the wells to a non-affiliated transmission company for resale in approximately fifteen communities in southwestern Kansas.

[fol. 83] "Macon Gas and Electric Light Company, a subsidiary of the Issuer, is engaged in the production and distribution of manufactured gas to approximately 250 customers in the City of Macon, Missouri.

"On November 30, 1935, the Issuer filed applications under the Public Utility Act of 1935 for orders exempting it from the provisions of the Act on the grounds that it was only incidentally a holding company and that it was not a subsidiary of Columbia Gas & Electric Corporation, and declaring it not to be a gas utility company as defined in the Act, and joined in an application of Panhandle Illinois Pipe Line Company for an order declaring that company not to be a gas utility company. These applications were amended in their entirety on March 2, 1937, by the substitution therefor of applications under Section 3(a) (3) of the Public Utility Act of 1935 for an order exempting the Issuer from the provisions of the Act on the ground that it is only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public utility company and that it does not derive any material part of its income from any subsidiary companies, the principal business of which is that of a public utility company; and under Section 2(a) (8) of the Act for an order declaring it not to be a subsidiary of Columbia Gas & Electric Corporation or of Columbia Oil & Gasoline Corporation, or of Missouri-Kansas Pipe Line Company, or of Gano Dunn, as Trustee for Columbia Oil & Gasoline Corporation, on the ground that the management or policies of the Issuer are not subject to a controlling influence directly or indirectly by any of such persons.

"Rule 2A 4-2, issued May 8, 1936, under the Public Utility Act of 1935 by the Securities and Exchange Commission contains, among other things, an interpretation of the words 'at retail' as used in the Act

point of delivery of the gas, as hereinbefore specified, to the point of division, of responsibility between the parties.

17. The natural gas to be sold hereunder, will be delivered by Seller to Buyer at main or lateral line pressures, without any reduction except such as Seller deems necessary to facilitate measurement and delivery.

18. The title to all meters, appliances, equipment, etc., placed on Buyer's premises and not sold to Buyer shall remain in Seller, with the right of removal at any time, and no charge shall be made by Buyer for use of premises occupied by same.

19. The obligation of Seller to sell and deliver gas hereunder shall be subject to Seller's right to curtail or interrupt deliveries of gas to Buyer, when, in Seller's judgment, such gas is needed to meet the requirements of other customers receiving service, either directly or indirectly, from the pipe line system of Seller, under classifications contemplating an uninterrupted supply of gas.

20. Neither party shall be liable to the other for any act, omission or circumstance occasioned by or in consequence of any acts of God, strikes, lockouts, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of rulers and peoples, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, temporary failure of gas supply, the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means, and any other cause, whether of the kind herein enumerated, or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome.

21. All gas sold and delivered hereunder is intended solely for use as industrial fuel in Buyer's plant and shall not be diverted or sold by Buyer.

22. This contract is subject to valid laws, orders, rules and regulations of duly constituted authorities having jurisdiction over either or both of the parties hereto, and shall inure to the benefit of and be binding upon the parties hereto, their respective successors and assigns.

and provides that gas sold for resale or to industrial consumers for their own use shall not be deemed to be distributed 'at retail' within the meaning of the Act, and under this interpretation, the Issuer does not consider itself to be a gas utility company, as defined in the Act.

"The Public Utility Act of 1935 provides that the filing in good faith of applications of the nature described above shall exempt any applicant from any obligation, duty, or liability imposed by the Act upon the applicant as a holding company or as a subsidiary company, as the case may be, until the Commission has acted upon such application. As of the date of filing of this Registration Statement the Commission had not, so far as the Issuer is advised, taken any action with respect to the above mentioned applications.

"On January 29, 1937, a bill to regulate the transmission and sale of natural gas in interstate commerce (H. R. 4008) was introduced in the House of Representatives. The Issuer is unable to estimate the extent to which this or any similar bill, if enacted, might affect its business."

[fol. 84] 40. On or about February 6, 1942 (the date on which Panhandle acquired the outstanding stock of Indiana Gas) all the then serving members of the board of directors of Indiana Gas resigned and Panhandle elected as the members of said board the persons whose names are, and whose resident addresses then were, as follows:

Name	Residence Address
Joe D. Creveling	New York, N. Y.
Henry H. Heimann	New York, N. Y.
William G. Maguire	New York, N. Y.
Walter G. Mertland	New York, N. Y.
Richard C. Patterson, Jr.	New York, N. Y.

Each of said persons was at said time an officer, director or employee of Panhandle. Each of said persons served as a director of Indiana Gas from the said date of his initial election to June 18, 1942.

41. On March 23, 1942, the board of directors of Indiana Gas was increased to nine members, and four additional

23. This contract supersedes and cancels all previous contracts and agreements, between the parties hereto, with respect to the subject matter hereof.

24. This contract shall not be considered as renewed or extended beyond the term hereof, except by express agreement of the parties hereto in writing.

25. Any notice, statement or bill provided for in this contract, or any notice which either party may desire to give to the other, shall be in writing and shall be duly delivered when mailed, by either registered or ordinary mail, to the post office address of either of the parties hereto, as the case may be, as follows:

Seller: Panhandle Eastern Pipe Line Company, 1221 Baltimore Ave., Kansas City, Missouri.

Buyer: E. I. DuPont DeNemours & Company, Wilmington, Delaware.

[fol. 91] 26. Seller agrees to construct, at its sole expense, the necessary lateral line, to transport the gas delivered hereunder, to Buyer's plant. Seller shall not be liable, however, for failure to construct such line or to deliver gas hereunder if such failure is due to a denial of any requisite approval thereof by any governmental agency having jurisdiction.

27. Buyer agrees to purchase and take gas hereunder during the period beginning with the date of first delivery of gas hereunder and extending for twenty-four (24) months thereafter in such amounts that its payments to Seller for gas taken during such period will aggregate at least thirty thousand dollars (\$30,000); and, in the event that Buyer shall fail to take and pay for gas in such aggregate amount during such period of twenty-four (24) months, Buyer agrees to pay to Seller within fifteen (15) days after the expiration of said period, as liquidated damages, the difference between (a) the amount of money paid by Buyer to Seller for all gas actually purchased and taken hereunder during the said period and (b) the aforesaid minimum amount of thirty thousand dollars (\$30,000). It is understood and agreed, however, that if Seller should, during said period of twenty-four (24) months fail continuously for a period exceeding two (2) weeks to deliver gas to Buyer (Buyer being ready, able and willing to receive gas), then

directors were elected whose names are, and whose residence addresses then were, as follows:

Name	Residence Address
Robert J. Bulkley	Cleveland, Ohio.
A. Faison Dixon	New York, N. Y.
Gano Dunn	New York, N. Y.
Raymond A. Ransom	New York, N. Y.

Each of said persons was at said time a director or an employee of Panhandle. Each of said persons served as a director of Indiana Gas from the said date of his election to June 18, 1942.

42. On and prior to June 18, 1942 Panhandle was conducting negotiations for either the sale of the stock of Indiana Gas or the sale of the property and assets of Indiana [fol. 85] Gas. On June 18, 1942 at the adjourned annual meeting of the shareholders of Indiana Gas the directors elected were persons whose names are, and whose residence addresses then were, as follows:

Name	Residence Address
Joe D. Creveling	New York, N. Y.
William G. Maguire	New York, N. Y.
George W. Brian	Zionsville, Indiana
Leo G. Chaplain	Zionsville, Indiana
Ronald D. Hold	Zionsville, Indiana
Charles C. Manion	Zionsville, Indiana
James A. Osborne	Zionsville, Indiana
Elva Ratliff	Zionsville, Indiana
Theodore G. Shuder	Zionsville, Indiana

Said persons served as directors of Indiana Gas until on or about July 10, 1942, the date of the sale by Panhandle of the stock of Indiana Gas as set forth in paragraph 21 hereof.

43. All of the natural gas delivered by Panhandle to Anchor-Hocking is gas transported from the states of Texas or Kansas by Panhandle for the purpose and with the intent on the part of Panhandle that gas so transported in the quantities sold to Anchor-Hocking shall be delivered to it. Panhandle sells no gas to Anchor-Hocking and

said sum of thirty thousand dollars (\$30,000) shall be reduced by that amount which has the same ratio to thirty thousand dollars (\$30,000) which said period of time during which Seller continuously failed to deliver gas to Buyer has to the period of twenty-four (24) months.

28. Notwithstanding anything herein contained to the contrary this agreement shall be null and void if for any reason Seller shall not have commenced delivery of gas hereunder before the first day of September 1945.

In witness whereof, the parties hereto have caused this agreement to be signed by their respective Presidents or Vice Presidents thereunto duly authorized, and their respective corporate seals to be hereto affixed and attested by their respective Secretaries or Assistant Secretaries, the day and year first above written.

Panhandle Eastern Pipe Line Company, by (Signed)
Hy Byrd, Vice President. (Corporate Seal).

Attest: (Signed) Leith V. Watkins, Secretary.

E. I. DuPont DeNemours & Company, By (Signed)
O. N. Davis, Assistant General Manager. (Corporate Seal).

Attest: (Signed) M. D. Fisher, Asst. Secretary.

[fol. 92] EXHIBIT "J-2" TO STIPULATION OF FACTS

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Docket No. G607

In the Matter of the Application of PANHANDLE EASTERN PIPE LINE COMPANY for a Certificate of Public Convenience and Necessity Under and Pursuant to Section 7 of the Natural Gas Act, as Amended.

APPLICATION

Comes now Panhandle Eastern Pipe Line Company, hereinafter referred to as "Applicant," and, pursuant to the provisions of Section 7 of the Natural Gas Act, as amended,

transports in its pipe lines no gas originating in the State of Indiana.

Dated this 9th day of January 1945.

William F. Dudine, Public Counselor. George N. Beamer. Barnes, Hickam, Pantzer & Boyd by Alan W. Boyd, Attorneys for Respondent, Panhandle Eastern Pipe Line Company. Van Atta, Batton & Harker, Robert R. Batton, Attorneys for Intervenor, Central Indiana Gas Company. Wil- [fol. 86] liam A. McClellan, Attorney for Intervenor, Greenfield Gas Company, Inc. John E. Fell, Attorney for Intervenor, Kokomo Gas and Fuel Company. Lawyer and Anderson, John C. Lawyer, Attorneys for Intervenor, Northern Indiana Public Service Company. Evans & Hebel, Edmond W. Hebel, Attorneys for Intervenor, Public Service Company of Indiana, Inc. Ortmeyer, Bamberger & Ortmeyer, By Edmund F. Ortmeyer, Attorneys for Intervenor, Southern Indiana Gas and Electric Company.

(Here follows Exhibit C, side folio 87)

applies for a Certificate of Public Convenience and Necessity to construct and operate the facilities hereinafter particularly described, and in support of such application respectfully submits:

1. Applicant is a corporation, organized and existing under the laws of the State of Delaware, with principal offices at 135 South La Salle Street, Chicago 3, Illinois, and at 1221 Baltimore Avenue, Kansas City 6, Missouri, and owns and operates an integrated natural gas pipe line system situated in the states of Texas, Oklahoma, Kansas, Missouri, Illinois, Indiana, Ohio and Michigan. Applicant is a "natural-gas company," as defined in the Natural Gas Act. It produces and purchases natural gas in the states of [fol. 93] Texas and Kansas and purchases gas in the State of Oklahoma and is engaged in the transportation and sale of such gas in interstate commerce (a) for resale for ultimate public consumption for domestic, commercial, industrial and other uses, and (b) directly to industries and to others for purchasers' own use.
2. As authorized by Section 57.5 of the Provisional Rules of Practice and Regulations under the Natural Gas Act, as amended; Applicant respectfully refers the Commission to the applications as supplemented and amended, heretofore filed by Applicant and its former subsidiaries, Illinois Natural Gas Company and Michigan Gas Transmission Corporation, under Section 7 of the said Act, as amended, in Docket Nos. G-254, G-452 and G-459, for a concise and comprehensive description of its corporate organization and structure, of its business operations and properties, of its gas reserves and of the gas companies and other customers served by it and of the areas served by such customers. The said applications, as supplemented and amended, with all exhibits filed therewith are herein incorporated by reference.
3. All communications in respect to the within application are to be addressed to John S. L. Yost, Counsel for Applicant, at 135 South La Salle Street; Chicago 3, Illinois.
- [fol. 94] 4. Applicant submits that during the period of approximately twelve (12) months prior to December 5,

1944, it was carrying on negotiations with Eastern Indiana Gas Company, a distribution company, having its principal office at New Castle, Indiana, and which company distributes gas in the town of Fortville, Hancock County, Indiana, for the sale to that company of the latter's requirements of natural gas at Fortville; further, that as of December 5, 1944, a written agreement was executed with the said company for the sale to said company of its requirements of natural gas for distribution and resale in the towns of Fortville and McCordsville, Hancock County, Indiana, and in the town of Ingalls, Madison County, Indiana. A conformed copy of the said agreement is hereto attached and marked "*Exhibit A*" and made a part of this application.

5. In order to effectuate deliveries of gas at the town border of Fortville, under the aforesaid contract, it will be necessary to construct and operate a three-inch pipe line, having its beginning or eastern terminus, at a point on the 4" lateral pipe line, known as the "Greenfield Lateral", in Section Seven (7), Township Seventeen (17) North, Range Seven (7) East, Hancock County, Indiana, and extending in a westerly direction approximately Three and Seven-tenths (3.7) miles to a point near the corporate limits of the town of Fortville, in Section Ten (10), Township Seventeen (17) North, Range Six (6) East, Hancock County, Indiana. The location of said proposed 3" line is more fully described in the plat marked "*Exhibit B*", attached hereto, and made a part of this application.

6. In connection with the operation of the said 3" pipe line, it will be necessary to construct and operate metering [fol. 95] and regulator stations and to install therein suitable meters and regulators. The locations of the said metering and regulator stations on the said 3" line are also indicated on the aforesaid plat, "*Exhibit B*", herein. The deliveries of gas to Eastern Indiana under the said agreement, for resale in the towns of Ingalls and McCordsville are dependent upon the construction of the necessary pipe line facilities by the said Company, connecting with the proposed 3" line.

7. In addition to the supplying of gas service to the said Eastern Indiana Gas Company, Applicant proposes to

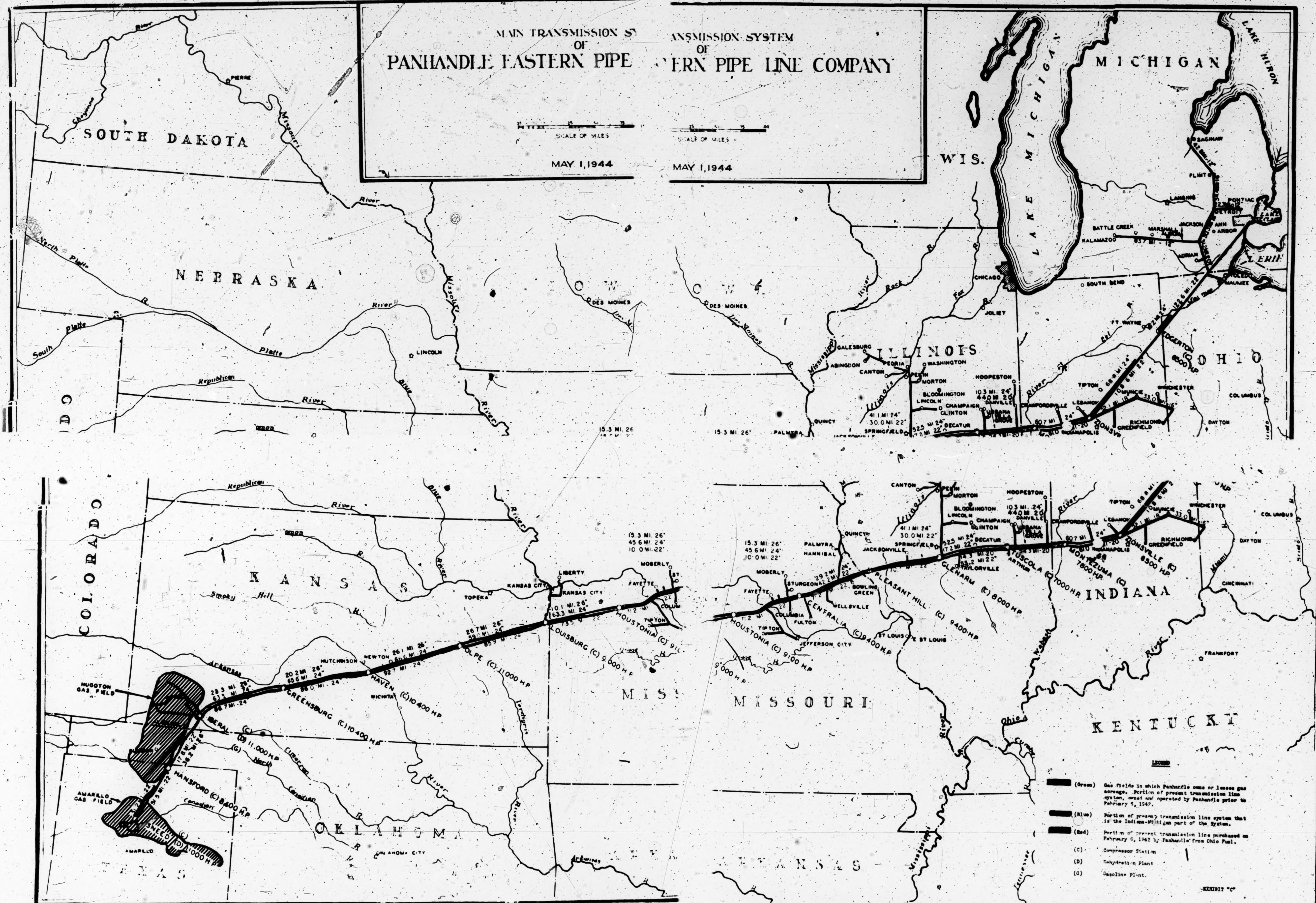
MAIN TRANSMISSION SYSTEM OF PANHANDLE EASTERN PIPE TRANSMISSION SYSTEM OF ERN PIPE LINE COMPANY

SCALE OF MILES

MAY 1, 1944

SCALE OF MILES

MAY 1, 1944



- (Green) Gas fields in which Panhandle owns or leases gas acreage. Portion of present transmission line system, owned and operated by Panhandle prior to February 6, 1947.
- (Blue) Portion of present transmission line system that is the Indiana-Michigan part of the System.
- (Red) Portion of present transmission line purchased on February 6, 1947 by Panhandle from Ohio Fuel.
- (C) Compressor Station
- (D) Hydratation Plant
- (G) Gasoline Plant.

supply the fuel requirements of the E. I. DuPont DeNe-mours and Company, a corporation, having a plant situated at the outskirts of the said town of Fortville, which plant is engaged in the production of sodium silicate and utilizing open-hearth furnaces in such operation; and in this connection, Applicant states that during the course of its negotiations for the sale of gas to Eastern Indiana, it has also been carrying on negotiations with the officials of the said DuPont Company for the sale to that Company of its requirements of natural gas (on an interruptible basis) for fuel, utilized in the firing of the open-hearth furnaces of the said plant; further, that such negotiations are practically completed, but the contract covering the said sale has not yet been executed. Upon the execution of such contract, a conformed copy thereof will be filed with the Commission in this proceeding.

[fol. 96] 8. Upon the execution of the proposed contract with the said DuPont Company, it will be necessary to construct and operate a metering and regulator station and to install therein a suitable meter and regulator for the service of gas to the said industrial plant. The location of this metering and regulator station is also indicated on the aforesaid plat, "*Exhibit B*", herein.

9. The materials required to be used in the aforesaid proposed construction will be the necessary three-inch pipe, fittings, valves, meters, regulators and metering and regulator stations, all of which materials and supplies are either now in the warehouses of Applicant or may be obtained by Applicant for prompt delivery.

10. Applicant, further, represents that the "Greenfield Lateral", referred to in Paragraph "4" herein, connects with Applicant's 18" transmission pipe line at a point near the town of Pendleton, Madison County, Indiana. The proposed point of interconnection of the proposed 3" pipe line with the said Greenfield lateral is situated approximately five and one-half (5½) miles south of the northern terminus of the said lateral. The location of the said Greenfield lateral and of the towns in the surrounding area is more particularly described in the plat, marked "*Exhibit C*", attached hereto and made a part of this application.

[fol. 88] EXHIBIT "J-1" TO STIPULATION OF FACTS

INDUSTRIAL GAS CONTRACT

This Agreement, made and entered into as of the 14th day of December, 1944, by and between Panhandle Eastern Pipe Line Company, a corporation of the State of Delaware, hereinafter referred to as "Seller," and E. I. DuPont De Nemours & Company, a corporation of the State of Delaware, hereinafter referred to as "Buyer":

Seller owns and operates a natural gas transmission system, used in the transmission and sale of natural gas, and has available certain quantities of natural gas which Seller desires to transport, sell and deliver to Buyer.

Buyer desires to purchase from Seller certain quantities of such natural gas for use in Buyer's plant located at Fortville, Indiana.

Now, Therefore, in consideration of the mutual covenants and agreements of the parties hereto, as herein set forth, the parties hereto covenant and agree as follows:

1. Seller agrees to transport, sell and deliver to Buyer, and Buyer agrees to purchase and receive from Seller, natural gas for use in Buyer's plant located at Fortville, Indiana, subject to the terms and conditions hereof, for the term of five (5) years beginning with date of first delivery of gas hereunder and at the price of three and one-half ($3\frac{1}{2}$) cents per therm.

[fol. 89] 2. Seller shall render bills on or before the 10th day of each calendar month for all gas delivered hereunder during the preceding month.

3. Buyer agrees to pay Seller on or before the 15th day of each calendar month for all gas delivered hereunder during the preceding month.

4. Seller will add to and include in bills rendered to Buyer hereunder the amount of any tax, with respect to the sale or delivery of gas hereunder, which Seller is now or hereafter required by law to collect from Buyer and pay to any governmental agency.

If, at any time, during the term hereof, any governmental agency imposes or levies a production, severance, sales or excise tax, with respect to the natural gas sold and delivered hereunder, in excess of such tax as is now levied

11. Applicant estimates that the cost of the proposed pipe line and appurtenant facilities is as follows:

[fol. 97] Pipe Line Materials	\$ 6,240
Measuring and Regulator Station Equipment	3,180
Labor	17,430
Rights of Way and Damages	2,350
Contingencies	4,700
Total	<hr/> \$33,900

In connection with the aforesaid material costs, Applicant is advised that since such estimated costs are in a sum less than \$10,000, a preference rating order for the required material is not required from the War Production Board.

12. Applicant represents, further, that upon request filed by it with the War Production Board, that Agency on October 21, 1944 granted Applicant authority to make deliveries of gas to Eastern Indiana, up to 100,000 cubic feet per day, for resale and distribution by Eastern Indiana in the towns of Fortville, McCordsville and Ingalls, Indiana. A copy of the said authorization is hereto attached, marked "Exhibit D", and made a part hereof. And in this connection, Applicant submits that, if natural gas service is requested by Greenfield Gas Company to meet that Company's requirements for its consumers in the town of Fortville, Indiana, Applicant will render such service through the proposed facilities, in accordance with its applicable rates, terms and conditions, on file with this Commission.

13. The facilities covered by this application constitute a part of Applicant's general pipe line system, and if constructed they will be supervised and operated with the general system; therefore, it is impracticable at this time to attempt to allocate operating expenses and fixed charges specifically attributable to such facilities.

[fol. 98] 14. The construction of the proposed facilities will be financed through the use of funds which Applicant has on hand; and if the Certificate herein applied for is

granted by the Commission, Applicant is prepared to immediately commence the construction work and contemplates that it should be able to complete it and place the facilities in operation within a period of approximately thirty (30) days thereafter.

15. Applicant, further, represents that the construction and operation of the proposed facilities, if authorized by the Commission, will afford consumers in the said towns of Fortville, McCordsville and Ingalls, Indiana, relief from the present shortage of gas occasioned by the depletion of local gas fields from which their requirements had heretofore been largely supplied.

16. Applicant is able and willing properly to do the acts and perform the service proposed and to conform to the provisions of the Natural Gas Act, as amended, and the requirements, rules and regulations of the Commission thereunder.

Wherefore, Applicant prays that Federal Power Commission issue to Applicant a Certificate of Public Convenience and Necessity under Section 7 of the Natural Gas Act, as amended, for the construction, operation and maintenance of the facilities hereinabove described, and further prays that, pending the determination of this application, the Commission issue to Applicant a temporary Certificate of Public Convenience and Necessity, as provided for in the said Section 7 of the Natural Gas Act, as amended, and in Section 57.9, Order No. 99 of the Commission's Provisional Rules of Practice and Regulations under the said Act.

Respectfully submitted, Panhandle Eastern Pipe Line Company, by Vice President _____

[fol. 100] STATE OF MISSOURI,
County of Jackson, ss:

_____, being first duly sworn, on oath says that he is Vice-President of Panhandle Eastern Pipe Line Company; that as such officer he has read the foregoing application and knows the contents thereof, and that the statements therein contained are true to his own knowledge, except as to those matters therein stated to be alleged upon

information or belief, and as to those matters he believes them to be true.

C. H. M. Burnham.

Subscribed and sworn to before me this — day
of — —, 1944.

— —, Notary Public.

My Commission expires:

[fol. 10]

EXHIBIT "A"

September 21, 1944.

Panhandle Eastern Pipe Line Company, 1221 Baltimore
Avenue, Kansas City, Missouri.

GENTLEMEN:

The undersigned desires, and hereby makes application, to purchase natural gas from you under your rate schedules Gd-1, on file with Federal Power Commission, for resale in the following communities: Fortville, McCordsville, and Ingalls, Indiana.

It is understood and agreed that all of the undersigned's gas requirements for resale as straight natural gas in the above specified communities and their environs do not exceed one hundred thousand (100,000) cubic feet per day, and you will not be obligated to deliver gas in excess of that amount.

The undersigned agrees to purchase natural gas for all of its gas requirements for resale as straight natural gas in the above specified communities and their environs from Panhandle Eastern Pipe Line Company, subject to the provisions of the above rate schedules and the General Terms and Conditions Section I, Sheets Nos. 10 to 16 inclusive, which by reference are hereby made a part hereof, during the period beginning September 21, 1944, and ending September 21, 1954, and thereafter until terminated upon six (6) months' prior notice.

Very truly yours, Eastern Indiana Gas Company, by
(S.) Arthur B. Ayres, President. (Corporate Seal.)

Attest: (S.) W. P. Thurston, Asst. Secretary.

Accepted this 5 day of December, 1944.

Panhandle Eastern Pipe Line Company, by (S.) Hy
Byrd, Vice President. (Corporate Seal.)

Attest: (S.) Leith V. Watkins, Secretary.

[fol. 102]

EXHIBIT "B"

Substitution Sheet

This sheet is in lieu of map showing location of the proposed 3" lateral to serve Fortville, Indiana.

[fol. 103]

EXHIBIT "C"

Substitution Sheet

This sheet is in lieu of map showing Portion of East-Central Indiana, Extending from Indianapolis to Ohio State Line.

[fol. 104]

EXHIBIT "D"

War Production Board

Washington 25, D. C.

In reply refer to: U-7, Tempo R, EMM.

October 21, 1944.

Panhandle Eastern Pipe Line Company, 135 South LaSalle Street, Chicago, Illinois.

Attention: Mr. O. W. Morton, Rate Engineer

GENTLEMEN:

This is in response to your letter of October 12, 1944, for authority to make deliveries of gas to Eastern Indiana Gas Company for general distribution in Fortville, McCordsville, and Ingalls, Indiana.

Pursuant to paragraph (b) (5) of Utilities Order U-7, as amended, you are hereby authorized to make deliveries of natural gas up to 100,000 cubic feet per day for resale and distribution in the above mentioned towns.

A copy of this letter is being sent to the Eastern Indiana Gas Company to serve as its authorization to receive such deliveries.

Very truly yours, by J. Joseph Whelan, Recording Secretary.

[fol. 105] EXHIBIT "N-1" TO STIPULATION OF FACTS

Industrial Gas Contract

This Agreement, made and entered into as of the 11th day of May, 1942, by and between Panhandle Eastern Pipe Line Company, a corporation of the State of Delaware, hereinafter referred to as "Seller," and Anchor Hocking Glass Corporation, a corporation of the State of Delaware, hereinafter referred to as "Buyer":

Seller owns and operates a natural gas transmission system, used in the transmission and sale of natural gas, and has available certain quantities of natural gas which Seller desires to transport, sell and deliver to Buyer.

Buyer desires to purchase from Seller certain quantities of such natural gas for use at Buyer's glass plant located at Winchester, Indiana.

Now, therefore, in consideration of the mutual covenants and agreements of the parties hereto, as herein set forth, the parties hereto covenant and agree as follows:

1. Seller agrees to transport, sell and deliver to Buyer, and Buyer agrees to purchase and receive from Seller, natural gas for not less than seventy-five per cent (75%) of its fuel requirements for glass melting, refining and finishing at Buyer's plant located at Winchester, Indiana, subject to the terms and conditions hereof, for the term of One (1) year from date hereof and thereafter until the expiration of thirty (30) days after the receipt by either party hereto from the other party hereto of written notice of termination, and at the price of first 500,000 therms per month at Two and Sixty-eight Hundreths (2.68) cents per therm, next 500,000 therms per month at Two and Four-tenths (2.4) cents per therm, all over 1,000,000 therms per month at Two and Three-tenths (2.3) cents per therm.

[fol. 106] 2. Seller shall render bills on or before the 10th day of each calendar month for all gas delivered hereunder during the preceding month.

3. Buyer agrees to pay Seller on or before the 15th day of each calendar month for all gas delivered hereunder during the preceding month.

4. Seller will add to and include in bills rendered to Buyer hereunder the amount of any tax, with respect to the sale or delivery of gas hereunder, which Seller is now or hereafter required by law to collect from Buyer and pay to any governmental agency.

If, at any time, during the term hereof, any governmental agency imposes or levies a production, severance, sales or excise tax, with respect to the natural gas sold and delivered hereunder, in excess of such tax as is now levied and imposed and which Seller is not required by law to collect from Buyer, the amount of such increased tax shall be added to the price to be paid by Buyer to Seller hereunder; provided, however, that in the event the amount of such additional tax, in the judgment of Buyer, shall operate to make the price of gas prohibitive to Buyer, then Buyer shall have the right and privilege of cancelling and terminating this contract, and thereupon all obligations and liabilities of the parties hereunder shall cease, unless Seller shall notify Buyer in writing of its election to assume and pay such additional tax; provided, further, that such cancellation and termination shall not affect Buyer's obligation to pay for all gas theretofore delivered by Seller.

5. In the event Buyer shall fail to pay any bill, for gas delivered hereunder, within the time herein provided, Seller, ~~in addition~~ to any other remedy it may have, may, at its option, cancel and terminate this contract; provided that, such cancellation and termination shall not affect Buyer's obligation to pay for all gas theretofore delivered by Seller.

6. Seller agrees that the gas delivered hereunder shall be merchantable, and that the average total heating value of the gas, delivered in any one day, shall not be less than nine hundred fifty (950) nor more than one thousand fifty (1,050) British thermal units per cubic foot.

7. The unit of the gas delivered hereunder shall be the therm, consisting of one hundred thousand (100,000) British thermal units.

8. The number of therms delivered shall be determined by multiplying the number of cubic feet of gas delivered, measured on the measurement basis hereinafter specified and corrected to saturated conditions, by the total heating value of such gas in British thermal units per cubic foot and by dividing the product by one hundred thousand (100,000).

9. The measurement of volume and the determination of total heating value of gas delivered hereunder shall be made in the following manner:

(a) The unit of volume, for the purpose of measurement and for the determination of total heating value, shall be one (1) cubic foot of gas saturated with water vapor, at a temperature of sixty (60) degrees Fahrenheit and an absolute pressure equivalent to that of thirty (30) inches of mercury at thirty-two (32) degrees Fahrenheit.

(b) The average absolute atmospheric pressure shall be assumed to be fourteen and four-tenths (14.4) pounds to the square inch, irrespective of actual elevation or location of the point of delivery above sea level or variations in such atmospheric pressure from time to time.

(c) The temperature of the gas flowing through the meters shall be assumed to be sixty (60) degrees Fahrenheit. Provided, however, Seller may, at its option, install a recording thermometer to record the temperature of the gas flowing through the meters, and where such installation is provided, the arithmetic average of the temperature recorded shall be used in computing measurements.

(d) The specific gravity and relative humidity of gas delivered hereunder shall be determined by approved methods at the beginning of the delivery of gas and thereafter monthly or at such other times as is found expedient in practice.

(e) The deviation of the natural gas from Boyle's Law, at the pressures under which said natural gas is delivered hereunder, shall be determined at intervals of three (3) months or at such other intervals as is found expedient in practice.

(f) The total heating value of the gas delivered hereunder shall be determined by a recording calorimeter located at Seller's Glenarm Compressor Station or at such other place as may be agreed upon.

10. The point of delivery of gas delivered hereunder shall be on the outlet side of Seller's measuring station at the

point of connection between the facilities of Seller with those of Buyer.

11. Seller agrees to install, maintain and operate at its own expense, at or near the point of delivery, a meter or meters and other necessary measuring equipment to measure the gas delivered hereunder.

12. Buyer shall have the right to be present at the time of any installing, reading, cleaning, changing, repairing, inspecting, calibrating or adjusting done in connection with Seller's measuring equipment used in measuring deliveries hereunder. The records from such measuring equipment shall remain the property of the Seller, but, upon the request of Buyer, Seller will submit such records and charts, together with calculations therefrom, for Buyer's inspection and verification, subject to return within ten (10) days after receipt thereof.

[fol. 107] 13. The accuracy of Seller's measuring equipment shall be verified by Seller at reasonable intervals, and whenever requested by Buyer, but Seller shall not be required to verify the accuracy of such equipment more frequently than once in any thirty (30) day period.

14. If, upon test, any measuring equipment (including recording calorimeter) is found to be not more than two (2) per cent fast or slow, previous recordings of such equipment shall be considered correct in computing the gas delivered hereunder; but such equipment shall be adjusted properly at once to record accurately. If, upon test, any measuring equipment is found to be inaccurate by an amount exceeding two (2) per cent, at a recording corresponding to the average hourly rate of flow for the period since the last preceding test, then any previous recordings shall be corrected to zero error, for any period which is known definitely or agreed upon, but, in case the period is not known definitely or agreed upon, such correction shall be for a period extending over one-half of the time elapsed since the date of last test, not exceeding a correction period of thirty (30) days.

15. Seller shall be in control and possession of the gas delivered hereunder and responsible for any damage or injury caused thereby, until the same shall have been delivered to Buyer at the point of delivery, after which, Buyer

shall be deemed to be in control and possession thereof and responsible for any injury or damage caused thereby.

16. Each party shall indemnify and save harmless the other party on account of any and all damages, claims or actions arising out of the maintenance or operation of the property or equipment of the indemnifying party, the point of delivery of the gas, as hereinbefore specified, to be the point of division of responsibility between the parties.

17. The natural gas to be sold hereunder, will be delivered by Seller to Buyer at main or lateral line pressures, without any deduction except such as Seller deems necessary to facilitate measurement and delivery.

18. The title to all meters, appliances, equipment, etc., placed on Buyer's premises and not sold to Buyer shall remain in Seller, with the right of removal at any time, and no charge shall be made by Buyer for use of premises occupied by same.

19. The obligation of Seller to sell and deliver gas hereunder shall be subject to Seller's right to curtail or interrupt deliveries of gas to Buyer, when, in Seller's judgment, such gas is needed to meet the requirements of other customers receiving service, either directly or indirectly, from the pipe-line system of Seller, under classifications contemplating an uninterrupted supply of gas.

20. Neither party shall be liable to the other for any act, omission or circumstance occasioned by or in consequence of any acts of God, strikes, lockouts, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of rulers and peoples, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, temporary failure of gas supply, the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means, and any other cause, whether of the kind herein enumerated, or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome.

21. All gas sold and delivered hereunder is intended solely for use as industrial fuel in Buyer's plant and shall not be diverted or sold by Buyer.

22. This contract is subject to valid laws, orders, rules and regulations of duly constituted authorities having jurisdiction over either or both of the parties hereto, and shall inure to the benefit of and be binding upon the parties hereto, their respective successors and assigns.

23. This contract supersedes and cancels all previous contracts and agreements, between the parties hereto, with respect to the subject matter hereof.

24. This contract shall not be considered as renewed or extended beyond the term hereof, except by express agreement of the parties hereto in writing.

25. Any notice, statement or bill provided for in this contract, or any notice which either party may desire to give to the other, shall be in writing and shall be duly delivered when mailed, by either registered or ordinary mail, to the post office address of either of the parties hereto, as the case may be, as follows:

Seller: Panhandle Eastern Pipe Line Company, 1221 Baltimore Ave., Kansas City, Missouri.

Buyer: Anchor Hocking Glass Corporation at Winchester, Indiana.

Make billings to: Anchor Hocking Glass Corporation, Lancaster, Ohio.

[fol. 108] In Witness Whereof, the parties hereto have caused this agreement to be signed by their respective Presidents or Vice Presidents thereunto duly authorized, and their respective corporate seals to be hereto affixed and attested by their respective Secretaries or Assistant Secretaries, the day and year first above written.

Panhandle Eastern Pipe Line Company, by G. J. Neuner, Vice President.

Attest: N. F. Paxton, Asst. Secretary.
(Corporate seal.)

Anchor Hocking Glass Corporation, By Wm. V. Fisher, Vice President. (Corporate seal.)

Attest: Hugh C. Laughlin, Secretary.

[fol. 109] STATE OF INDIANA, PUBLIC SERVICE COMMISSION
OF INDIANA

Cause No. 16741

In the Matter of the Investigation by the Commission in
Respect of the Distribution by Panhandle Eastern Pipe
Line Company, as a Public Utility, of Natural Gas to
Consumers, Within the State of Indiana.

STIPULATION OF EVIDENCE

It is agreed by and between the parties to this stipulation that Kokomo Gas and Fuel Company, Public Service Company of Indiana, Inc. and Central Indiana Gas Company would have offered in evidence at the hearing in the proceedings in this cause the material contained in paragraph No. 14, paragraphs No. 15 to 17, inclusive, and paragraphs No. 18 to 27, inclusive, respectively, contained in a draft of proposed stipulation bearing date of November 22, 1944, a copy of said paragraphs being set out below. The material contained therein shall be considered as evidence in this cause, said material containing the substance of what witnesses on behalf of said respective intervenors would have stated in oral testimony and what would have been offered as documentary proof as part of the record in said cause through the testimony of said witnesses.

It is expressly agreed by the parties to this stipulation, however, that all of the evidence offered herein and hereby is and shall be subject to any object which Panhandle Eastern Pipe Line Company may assert as to the relevancy or materiality of any evidence herein stipulated, or its right to take and preserve an exception to any ruling by the Public Service Commission of Indiana to any objection by said party to the relevancy or materiality of such evidence, provided, however, that any such objection or objections shall be made in writing and filed with Public Service Commission of Indiana in this cause not later than March 29, 1945. Any objection not so taken shall be deemed as waived.

14. Under date of June 8, 1943, Mr. Edward M. Hahn, vice-president and general manager of Kokomo Company, wrote to Panhandle relative to a draft of a renewal contract (hereinafter called the "Continental Supply Con-

tract") covering natural gas for resale to an industrial consumer, Continental Steel Corporation, at the plant of said industrial consumer in Kokomo, Indiana. The expiration date of such contract was November 1, 1943. Under date of June 24, 1943, Panhandle replied to said letter by [fol. 110] acknowledging receipt thereof, and advising Kokomo Company that the renewal of the Continental Supply Contract was being considered and that Panhandle would soon be in a position to discuss the matter further with Kokomo Company. In the afternoon of June 29, 1943, Mr. O. W. Morton, rate engineer of Panhandle, and Mr. George Ballard, industrial gas sales engineer of Panhandle, called on said Mr. Hahn and Mr. Elmer E. Linburg, a vice-president of Kokomo Company and vice-president and general manager of Richmond Gas Corporation, at the office of Kokomo Company in Kokomo, Indiana. Mr. Morton stated that Panhandle desired, and was planning in the future, to make all industrial gas supply contracts, such as the one between Kokomo Company and Continental Steel Corporation, direct with the industrial consumers; that some arrangement would have to be worked out whereby the interest of Kokomo Company in such gas sales would be continued; but the ultimate consumer would no longer be a customer of Kokomo Company but would be a customer of Panhandle; that if Panhandle sold direct to Continental Steel Corporation, the sale would not come under the jurisdiction of the Federal Power Commission; and that such was the chief objective of Panhandle in making such contracts direct with the industrial consumers. Mr. Hahn stated that Kokomo Company would not be a party to the proposed arrangements. Mr. Morton stated that he and Mr. Ballard desired to contact the representatives of Continental Steel Corporation and that they had been instructed by Panhandle to contact such representatives whether or not representatives of Kokomo Company accompanied them in such a meeting. Messrs. Hahn and Linburg expressed a desire to be present at any such meeting, and Mr. Hahn arranged for an appointment with Mr. D. A. Williams, president of said Continental Steel Corporation. On the morning of June 30, 1943, said Messrs. Morton, Ballard, Hahn and Linburg met with said Mr. Williams and Mr. Ralph K. Clifford, vice-president in charge of operations of said Continental Steel Corporation. At such meeting, said Mr. Morton again explained the position

of Panhandle and stated that it would be the intention of Panhandle to make all contracts for supplying gas to large industrial consumers direct with such consumers and [fol. 111] that Panhandle hoped to be able to make such arrangements with said Continental Steel Corporation. Under date of October 11, 1943, Panhandle forwarded to Kokomo Company for acceptance an extension of the Continental Supply Contract which provided for termination by either party on 60 days written notice. On October 19, 1943, Kokomo Company accepted such extension agreement, and on said date, Kokomo Company and said Continental Steel Corporation made a supplemental agreement to their above mentioned existing natural gas supply contract fixing a like termination period. On October 20, 1943, a copy of said supplemental agreement was filed with the Public Service Commission of Indiana by Kokomo Company, and on October 22, 1943 the same was approved by said commission.

15. On the afternoon of June 30, 1943, said Messrs. Morton and Ballard called on Mr. G. J. Oglebay, vice-president of Service Company, and Mr. Herman Horstman, superintendent of gas and water transmission and distribution of Service Company. The meeting was held in connection with the matter of a supply of natural gas for the Ingersoll Steel and Disc Division of the Borg Warner Corporation (hereinafter called "Ingersoll Company"), a large industrial consumer, at New Castle, Indiana, being supplied by Service Company under an interruptible gas contract for a term ending on July 31, 1943. Such gas was obtained by Service Company from Panhandle under a special industrial customer agreement (hereinafter called the "Ingersoll Supply Contract") for a term ending on July 31, 1943. At that meeting Mr. Morton stated that the purpose of their visit was in connection with the resale of gas to interruptible customers served by Service Company; that the Federal Power Commission had previously ruled that direct sales of gas to consumers of pipe line companies were not subject to regulation by such commission; that Panhandle desired to sell as much industrial load direct to industries as possible in order to remove this segment of its business from the jurisdiction of such commission; that Panhandle proposed to sell direct to the industrial consumers at the points of interconnection between the facilities of Panhandle

and the present distributing utilities, that the facilities of [fol. 112] the present distributing utilities would be utilized to transmit the natural gas for the account of the industrial consumers, who would reimburse the distributing utilities in an amount approximating the 20% of the rate being received by them on the sale of the interruptible natural gas; that present plans of Panhandle contemplated limiting the size of interruptible industrial consumers that Panhandle desired to serve direct to such consumers as had a monthly consumption of about 10,000,000 or more cubic feet of gas; and that he had been directed by Panhandle to outline the plan to the separate industrial consumers now served with interruptible gas by Service Company.

16. On July 1, 1943, said Messrs. Morton and Ballard called on Mr. Roy M. Atwater, assistant superintendent of Ingersoll Company, and Mr. Howard Warfield, purchasing agent of said company, at the industrial plant of said company at New Castle, Indiana. At this meeting Mr. Morton stated that Panhandle intended to serve natural gas direct to the said plant of Ingersoll Company, and likewise intended to serve direct all other large industrial gas consumers up and down the pipe line of Panhandle. Mr. Morton and Mr. Ballard referred to certain industrial consumers in the vicinity of Kansas City, whom they stated Panhandle was already serving and to whom they stated Panhandle was giving superior service.

17. Under date of July 19, 1943, Panhandle forwarded to Service Company for acceptance an extension of the Ingersoll Supply Contract which provided for termination by either party on 60 days written notice. On July 29, 1943, Service Company accepted such extension agreement, and under date of July 30, 1943 Service Company and said Ingersoll Company entered into a supplemental agreement to their above mentioned existing natural gas supply contract fixing a like termination period. On August 5, 1943 a copy of said supplemental agreement was filed with the Public Service Commission of Indiana by Service Company, and on August 13, 1943 the same was approved by said commission.

[fol. 113] 18. Early in 1941 Panhandle and intervenor Central Indiana Gas Company (hereinafter called "Central Gas"), an Indiana corporation, were in process of nego-

tiating the terms and provisions of a new gas supply contract. Panhandle initially submitted to Central Gas its printed form of proposed contract. In May 1941, in the course of such negotiations, Central Gas requested of Panhandle that such contract contain a provision which, in substance, would prohibit Panhandle from serving directly natural gas to consumers served directly by Central Gas located within its service area without the consent of Central Gas. Panhandle refused to include any such provision in any form. Such negotiations were conducted on behalf of Panhandle by Mr. G. J. Neuner, vice-president in charge of operations of Panhandle, located in its office in Kansas City, Missouri, and Mr. R. A. Ransom, a director and employee of Panhandle located in its office in New York City. Attached hereto as "Exhibit H-1" and hereby incorporated herein is a copy of letter from Mr. G. B. Pidot, acting on behalf of Central Gas, to Mr. W. L. Glenn, general counsel for Panhandle, dated June 5, 1941, with respect to such proposed provision in the contract under negotiation.

19. Panhandle and Central Gas, respectively, executed and delivered a new gas supply contract dated July 31, 1941, a copy of which is attached hereto as "Exhibit I" and is hereby made a part hereof. Said contract was executed and delivered by said companies on or about 31, 1941. Panhandle subsequently informed Central Gas that its board of directors refused to approve said contract. Attached hereto as "Exhibit J" is a copy of letter from Panhandle to Central Gas, dated August 28, 1941, to which is attached a proposed form of amendment to said contract. Said proposed letter of amendment contains the following statement:

"However, it was indicated (by the Board of Directors of Panhandle) if a reasonable limit were placed on the term said contract (dated July 31, 1941) with respect to the sale of gas for resale to Special Industrial Customers and Off-Peak Customers, the contract probably would meet with the approval of the Board. You have represented to us that you are now committed to certain of your Special Industrial and Off-Peak Customers for terms exceeding one year from and after August 1, 1941. We are willing to recommend to the Board that these obligations be recognized."

20. Numerous conferences were held between representatives of Central Gas and representatives of Panhandle in the period from August 1941 to August 1942 or thereabouts, negotiating on the provision in said new gas supply [fol. 114] contract, dated July 31, 1941, relating to natural gas service to so-called Special Industrial and Off-Peak Customers. One such conference was held in October 1941 in Washington, D. C. at which Central Gas was represented by its president, Mr. G. T. Henry, and by Mr. P. R. Taylor, and Panhandle by Mr. J. D. Creveling and said Mr. G. J. Neuner, its president and vice-president, respectively. Another such conference was held in New York City on March 6, 1942 attended by said Mr. R. A. Ransom on behalf of Panhandle and said Mr. G. B. Pidot on behalf of Central Gas. Still another such conference was held on April 22, 1942 in Washington, D. C. attended by said Mr. J. D. Creveling on behalf of Panhandle, and said Messrs. B. T. Henry and G. B. Pidot on behalf of Central Gas. Another such conference was held on April 23, 1942 in New York City attended by Mr. E. N. Goodwin, general counsel of Panhandle, and said Mr. R. A. Ransom on behalf of Panhandle, and by said Mr. P. R. Taylor, G. T. Henry and G. B. Pidot on behalf of Central Gas. At several of these conferences, and particularly the conference on April 23, 1942 in New York City, the representatives of Panhandle stated that the refusal of the board of directors of Panhandle to approve the new gas supply contract dated July 31, 1941 was based upon the policy that Panhandle should undertake at sometime or other to serve directly some or all of these industrial consumers which are being served by Central Indiana with natural gas purchased by Central Indiana from Panhandle.

21. On August 4, 1942, Central Gas directed to the Federal Power Commission in Washington, D. C. for filing under the Natural Gas Act a petition, copy of which is attached hereto as "Exhibit K" and is hereby made a part hereof. Paragraph 4 of said petition reads, in part, as follows:

"4. On April 23, 1942, Panhandle stated to the Petitioner that the Board of Directors of Panhandle would authorize the new contract but only if it were amended so that Panhandle would not be required to sell gas to the Petitioner for resale to any of its interruptible

industrial customers except for those such customers specifically named (on pages 4 and 5) in the new contract, and only for the period of the contracts then in effect between the Petitioner and the said customers. It is the position of Panhandle that, although it may have both the gas and the ability to deliver it to the Petitioner, it will not sell to the Petitioner, on the basis of the applicable rate schedule provided in the new contract, gas for resale to any other such industrial customers or to such industrial customers (specifically named in the new contract) beyond a fixed period. Panhandle has announced to the Petitioner [fol. 115] that its policy underlying that position, is to take over and serve directly such industrial customers which it refuses to serve through the Petitioner."

22. Attached hereto as "Exhibit L" and hereby made a part hereof is a copy of a notice of cancellation or termination, dated May 18, 1943, by Panhandle to the Federal Power Commission, notifying said commission of the proposed cancellation on specified dates in July and August of 1943, of rate schedules therein identified, covering natural gas purchased by Central Gas from Panhandle for resale for ultimate consumption by fourteen industrial customers of Central Gas, named in said notice.

23. On June 3, 1943, said Mr. G. T. Henry and G. B. Pidot, conferred with Mr. W. G. McGuire and Mr. C. Buddruss, chairman of the board and president, respectively, of Panhandle, in the Chicago office of Panhandle, with respect to the threat or attempt by Panhandle, in connection with said notice of cancellation of rate schedules covering natural gas purchased by Central Gas for resale to fourteen of its large industrial customers, to undertake to serve such customers directly. These representatives of Panhandle stated that Panhandle was interested in serving directly certain industrial customers of Central Gas but on some basis which would make such direct service by Panhandle outside of the jurisdiction of the Federal Power Commission under the Natural Gas Act. Said Mr. W. G. McGuire stated at such conference that Panhandle was anxious to take over such business because it was unregulated transaction both as to the Federal Power

Commission and the Public Service Commission of Indiana and that he intended to establish higher industrial rates based on a competitive fuel basis. On or about June 11, 1943 said Messrs. W. G. McGuire, C. Buddruss and I. L. Letts, as representatives of Panhandle, the last named being its general counsel, and said Messrs. G. T. Henry, L. N. Boisen and G. B. Pidot, as representatives of Central Gas, conferred in the office of said Mr. W. C. McGuire in New York City. The representatives of Panhandle stated in substance that Panhandle intended to take over direct service to certain of the large industrial customers of Central Gas and any negotiations would have to be with that eventuality in mind.

24. Attached hereto as "Exhibit M" and hereby made [fol. 116] a part hereof is a copy of a letter of Central Gas to the Federal Power Commission, dated August 9, 1943, which is, as therein stated, "in reply to your (Federal Power Commission) letter of May 29, 1943, requesting information on the effect of notice of cancellation or termination dated May 18, 1943 by Panhandle Eastern Pipe Line Company filed with the Federal Power Commission, relating to certain rate schedules therein described for natural gas service to Central Indiana Gas Company for resale to industrial consumers." Said letter contains, in part, the following:

"It is the declared policy and intention of Panhandle Eastern Pipeline Company to abandon service to Central Indiana Gas Company for resale to these industrial consumers, and to try to take over and serve directly these industrial consumers so that the rates to be charged therefor will be beyond the regulatory control of the Federal Power Commission. Since it is patently impossible, as shown by the attached map, for Panhandle Eastern Pipeline Company now to serve these industrial consumers except by means of the facilities of Central Indiana Gas Company and since, as stated by Panhandle Eastern Pipeline Company in its notice of cancellation, it intends to continue service for these industrial consumers, we do not see that there is any alternative for Central Indiana Gas Company but to disapprove and oppose vigorously the proposed cancellation. It is clear that the present and future public convenience and necessity will not permit such

proposed abandonment. Further, it is noteworthy that the underlying purpose of such proposed abandonment is to try to effect a technical or paper rearrangement of this sale to Central Indiana Gas Company for resale to industrial consumers, so that it will have the appearance of a direct sale and hence be at rates not subject to the jurisdiction of the Federal Power Commission."

25. The following is a copy of letter from Panhandle to the Federal Power Commission, withdrawing its notice of cancellation dated May 18, 1943, as amended and extended:

"September 1, 1943

Federal Power Commission
Washington, D. C.

Attention: Leon M. Fuquay, Secretary
Re: Docket No. G-495

Dears Sirs:

This letter is with reference to the letter of Central Indiana Gas Company to you, dated August 9, 1943, protesting our notice of cancellation, dated May 18, 1943, of contracts with Central Indiana Gas Company for its gas requirements for resale to fourteen of its industrial customers.

We have not concluded negotiations with certain other war industries, not presently served by us, which would require volumes of gas equal to those volumes required by Central Indiana Gas Company to serve said fourteen industrial customers. Moreover, because of the shortage and the conservation of critical [fol. 117] materials, we are unable at this time to obtain the necessary facilities to render direct service to any of the industries named in our notice of cancellation.

Without altering our policy to any extent whatsoever with respect to this matter, but for the reasons above stated, we hereby withdraw said notice of cancellation, dated May 18, 1943, as amended and extended by our letters to Federal Power Commission, dated June 14, 1943 and July 23, 1943, without prejudice to

our right of again filing a similar notice of cancellation, which we intend to do, at such time as it may appear to us to be desirable.

Very truly yours, — — —, President.

cc: Central Indiana Gas Company"

26. The following is a copy of letter from Central Gas to Federal Power Commission, dated October 22, 1943, withdrawing its protest to the proposed notice of cancellation:

October 22, 1943.

Federal Power Commission
Washington, D. C.

Attention: Office of the Secretary

DEAR SIRs:

We have received, presumably from Panhandle Eastern Pipeline Company, an unsigned copy of letter dated September 1, 1943 addressed to the Federal Power Commission and referring to Docket No. G495.

That letter withdraws the notice of cancellation by Panhandle Eastern Pipeline Company to the Federal Power Commission, dated May 18, 1943, as amended and extended, relating to certain rate schedules therein described for natural gas service to Central Indiana Gas Company for resale to industrial consumers. Since our letter to you dated August 9, 1943 disapproving and opposing the proposed cancellation was in the nature of a protest responsive to the notice of cancellation, we should like to advise that in view of the withdrawal of that notice of cancellation, the Commission may consider that the purpose of our protest has been effectuated. Accordingly, we are pleased to have the Commission consider our protest as withdrawn. Since there appears a statement in the letter of withdrawal by Panhandle Eastern Pipeline Company that they intend at some future time to file again a similar notice of cancellation, our withdrawal is necessarily without prejudice to our rights of filing again a protest or taking any other action which may be necessary or desirable to assure compliance by Panhandle East-

ern Pipeline Company with the requirements of the Natural Gas Act.

Very truly yours, Central Indiana Gas Company, By Guy T. Henry, President."

[fol. 118] 27. Attached hereto as "Exhibit N" and hereby made a part hereof is a copy of a letter from Central Gas to the Federal Power Commission, dated May 13, 1944, filed in said commission's Docket No. G-405, withdrawing, without prejudice, said petition, affirming therein the allegations contained in said petition.

Dated this 28th day of March, 1945.

(Signed) William F. Dudine, Public Counselor, Alan W. Boyd, George N. Beamer, Attorneys for Respondent, Panhandle Eastern Pipe Line Company. Van Atta, Batton & Harker, Attorneys for Intervenor, Central Indiana Gas Company. William A. McClellen, Attorney for intervenor, Greenfield Gas Company, Inc. John E. Fell, Attorney for Intervenor, Kokomo Gas and Fuel Company. Lawyer & Anderson, Attorneys for Intervenor, Northern Indiana Public Service Company. Evans & Hebel, Edmond W. Hebel, Attorneys for Intervenor, Public Service Company of Indiana, Inc. ———, Attorneys for Intervenor, Southern Indiana Gas and Electric Company.

[fol. 119]

STATE OF INDIANA

PUBLIC SERVICE COMMISSION OF INDIANA

Cause No. 16741

In the Matter of the Investigation by the Commission in Respect of the Distribution by Panhandle Eastern Pipe Line Company, as a Public Utility, of Natural Gas to Consumers Within the State of Indiana.

SUPPLEMENTAL STIPULATION OF FACTS

1. It is agreed by and between the parties to this Supplemental Stipulation of Facts that the same shall be in all

respects subject to the limitations set forth in Subdivisions I, II and IV of the Stipulation of Facts heretofore filed in this proceeding.

2. On the 5th day of June, 1945, the Federal Power Commission entered an order in the proceeding described in paragraph 12 of Subdivision VI of said Stipulation of Facts as Docket G 607, a copy of which order is attached hereto and made a part hereof as Exhibit Q-1.

3. Thereafter, on the 29th day of June, 1945, Panhandle Eastern Pipe Line Company, Inc., filed in said proceeding its petition for modification of said order, a copy of which petition is attached hereto and made a part hereof as Exhibit Q-2.

4. Thereafter, Greenfield Natural Gas, Inc., and Eastern Indiana Public Service Company filed written answers in [fol. 120] said proceeding, agreeing to modification as prayed by Panhandle Eastern Pipe Line Company, Inc.

5. On the 6th day of July, 1945, the Public Service Commission of Indiana filed in said proceeding an answer, a copy of which is attached hereto and made a part hereof as Exhibit Q13.

6. Thereafter, on the 10th day of July, 1945, said Federal Power Commission entered an order modifying said order of June 5th, 1945, a copy of which is attached hereto and made a part hereof as Exhibit Q-4.

7. Since the modification of said order Panhandle Eastern Pipe Line Company, Inc., has caused to be constructed the facilities authorized in said order as modified. Up to the date of the filing of this stipulation Panhandle Eastern Pipe Line Company, Inc., has not sold or delivered gas to E. I. DuPont DeNemours & Company under the contract, a copy of which contract is attached to the Stipulation of Facts heretofore filed as Exhibit J-1, for the reason that the purchaser is not yet ready for the delivery of said gas, although the construction of all Panhandle Eastern Pipe Line Company, Inc., facilities therefor has been completed. A photostatic copy of an instrument entitled, "Evidence of Issue of Certificate of Public Convenience and Necessity" by the Federal Power Commission to Panhandle Eastern

Pipe Line Company is attached hereto and made a part hereof as Exhibit Q-5.

Dated, this 3rd day of October, 1945.

— — Public Counsellor. Barnes, ~~Hidson~~,
Pantzer & Boyd, George N. Beamer, Attorneys
for Respondent, Panhandle Eastern Pipe Line
[fol. 121] Company, Inc. — —, Attorneys for
Intervenor, Central Indiana Gas Company.
— —, Attorney for Intervenor, Greenfield Gas
Company, Inc. — —, Attorney for Intervenor,
Kokomo Gas and Fuel Company. — —, At-
torneys for Intervenor, Northern Indiana Public
Service Company. — —, Attorneys for Inter-
venor, Public Service Company of Indiana, Inc.
— —, Attorneys for Intervenor, Southern In-
diana Gas and Electric Company.

[fol. 122] EXHIBIT Q-1 TO STIPULATION OF FACTS

UNITED STATES OF AMERICA

Federal Power Commission

Before Commissioners: Basil Manly; Chairman; Claude L.
Draper, Leland Olds, John W. Scott and Nelson Lee
Smith

June 5, 1945.

Docket No. G-587. Docket No. G-607. Docket No. G-608

In the Matters of

GREENFIELD GAS COMPANY, INC., and GREENFIELD GAS
COMPANY, INC.

v.

PANHANDLE EASTERN PIPE LINE COMPANY

PANHANDLE EASTERN PIPE LINE COMPANY

EASTERN INDIANA GAS COMPANY

ORDER ISSUING CERTIFICATES OF PUBLIC CONVENIENCE AND
NECESSITY

Greenfield Gas Company, Inc. (Greenfield), Panhandle
Eastern Pipe Line Company (Panhandle Eastern), and
Eastern Indiana Gas Company (Eastern Indiana) have

filed separate applications in the above-entitled matters, each requesting a certificate of public convenience and necessity pursuant to Section 7(c) of the Natural Gas Act, as amended, for authority to construct and operate substantially the same facilities, consisting of a 3-inch diameter pipe line extending from a point of connection with Panhandle Eastern's 4-inch Greenfield lateral transmission line to the town of Fortville, Indiana. Eastern Indiana also proposes to construct a 2-inch pipe line from such 3-inch line to serve the town of Ingalls, Indiana.¹ At the hearing in these matters both Greenfield and Eastern Indiana requested permission to withdraw their applications to construct and operate the proposed 3-inch line in favor of Panhandle Eastern's construction of such line provided the latter's application was granted by the Commission. [fol. 123] It appears to the Commission that:

(a) Pursuant to order of December 11, 1944, and after appropriate notice thereof, a public hearing on Greenfield's application in Docket No. G-587 was held in Indianapolis, Indiana, commencing December 21, and recessed on December 22, 1944, subject to further

¹ In its application filed October 18, 1944 (Docket No. G-587), Greenfield proposes to construct 5 miles of 3-inch pipe line extending from a point of connection on Panhandle Eastern's existing 4-inch pipe line serving Greenfield, Indiana, in a westerly direction to Fortville. Greenfield further requests an order directing Panhandle Eastern to interconnect its 4-inch line with Greenfield's proposed 3-inch line and to sell and deliver natural gas to Greenfield at such proposed interconnection. Panhandle Eastern's application filed December 18, 1944 (Docket No. G-607), seeks authority to construct 3.7 miles of 3-inch pipe line in Hancock County, Indiana, from a point on its aforesaid 4-inch pipe line in Sec. 7, T. 17 N., R. 7 E. to the corporate limits of Fortville at a point in Sec. 10, T. 17 N., R. 6 E., together with metering and regulating facilities. Eastern Indiana proposes in its application filed December 19, 1944 (Docket No. G-608), to construct 3.7 miles of 3-inch pipe line to connect Panhandle Eastern's 4-inch pipe line with its facilities in Fortville, together with one mile of 2-inch pipe line extending in a northerly direction from the proposed 3-inch pipe line to the town of Ingalls, Indiana.

order of the Commission. At such hearing Panhandle Eastern and Eastern Indiana both requested that Greenfield's application be dismissed or, in the alternative, that the proceedings thereon be abated pending consideration of their applications to construct similar facilities. Pursuant to order of January 2, 1945, the proceedings on the applications of Panhandle Eastern (Docket No. G-607) and Eastern Indiana (Docket No. G-608) were consolidated with the proceedings on Greenfield's application for purposes of hearing, which was held in Washington, D. C., on February 26, 1945. The Public Service Commission of Indiana and the Public Counsellor of Indiana participated in all hearings in these matters.

(b) Over a long period of years the communities of Fortville, McCordsville and Ingalls, Indiana, were supplied with natural gas from local wells. Such wells have become so depleted as to be no longer able to meet the demands of those communities. The town of Ingalls is now without any gas supply, and the supply in Fortville and McCordsville is inadequate. The Vernon Natural Gas and Oil Company formerly supplied a part of the market in Fortville, but its wells became depleted, and, on August 18, 1944, the Public Service Commission of Indiana authorized the acquisition of that company's facilities by Greenfield, reciting in its order the failure of the local gas supply, the complaints resulting therefrom, and the assurance of Greenfield to bring in a dependable gas supply by connecting the Fortville distribution system with Panhandle Eastern's aforesaid 4-inch pipe line. Greenfield now serves approximately 222 consumers in Fortville through such facilities. Eastern Indiana also serves approximately 268 consumers in Fortville. Many other customers in that city have discontinued service because of the inadequacy of supply. Eastern Indiana also supplies 44 customers in McCordsville. On December 4, 1944, Arthur B. Ayres, the president and principal stockholder in Eastern Indiana, acquired the distribution system in Ingalls, which system will be made available [fol. 124] to Eastern Indiana, and service will be resumed to approximately 50 consumers upon the completion of the facilities hereinafter authorized. Serv-

ice by Greenfield and Eastern Indiana is rendered in accordance with rate schedules approved by, and on file with, the Public Service Commission of Indiana.

(c) The Public Service Commission of Indiana, recognizing the need for additional gas supplies in this area, on August 10, 1943, ordered Eastern Indiana to obtain such supplies "from the nearest interstate pipe line company, or any other available practicable source."

(d) Greenfield presently obtains natural gas for its customers in Fortville through a 2-inch transmission pipe line connecting its facilities serving that town with Panhandle Eastern's 4-inch pipe line to Greenfield. Such 2-inch line is in poor condition and is inadequate to supply the requirements of all consumers in Fortville. After the proposed 3-inch line is placed in operation by Panhandle Eastern's 4-inch Greenfield line and will be used as a low-pressure distribution line to serve rural customers adjacent to it.

(e) The Public Service Commission of Indiana takes the position that a new line to Fortville and Ingalls is required for the rendition of adequate gas service to such communities. Because of the depleted local supplies, Panhandle Eastern affords the nearest and most dependable source of supply for these communities. Panhandle Eastern, moreover, is better able than the other applicants to construct and maintain the proposed 3-inch pipe line by reason of its strong financial condition and maintenance organization. Neither Greenfield nor Eastern Indiana has available funds necessary for the construction of the proposed 3-inch line, and both would have to obtain loans for such construction. Panhandle Eastern, on the other hand, has adequate cash on hand to finance the work. Furthermore, Greenfield and Eastern Indiana prefer that the proposed 3-inch line should be built by Panhandle Eastern. Eastern Indiana is able to finance and construct the proposed 2-inch line to Ingalls.

(f) Panhandle Eastern has entered into a contract for the sale of Eastern Indiana's gas requirements in Fortville, Ingalls and McCordsville and has stipulated on the record that it will supply Greenfield with suf-

ficient volumes of gas to meet the requirements of the latter's customers in and adjacent to Fortville. The War Production Board has issued to Panhandle Eastern such authorization as is required to render the proposed service to Greenfield and Eastern Indiana.

[fol. 125] (g) Panhandle Eastern's reserves of natural gas in the Texas Panhandle field and in the Hugoton field located in Texas, Oklahoma, and Kansas are adequate to permit the proposed deliveries through the proposed 3-inch line to Greenfield and Eastern Indiana, which line will become an integral part of Panhandle Eastern's interstate transmission pipe-line system.

(h) Panhandle Eastern has also entered into a contract for the sale of natural gas to the chemical plant of E. I. du Pont de Nemours & Company located at Fortville. However, the War Production Board has not approved such deliveries of gas, and, inasmuch as the commencement of this service is indefinite, no action should be taken with respect thereto at this time.

The Commission, having considered the applications and the record thereon with respect to the matters involved and the issues presented, *finds* that:

(1) Panhandle Eastern, a Delaware corporation having its principal place of business in Kansas City, Missouri, is engaged in the transportation and sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial and other uses and is, therefore (as heretofore found by the Commission in its Opinion No. 80 and order entered on September 23, 1942, in Docket Nos. G-200 and G-207), a "natural-gas company" within the meaning of the Natural Gas Act.

(2) The 3-inch pipe line proposed to be constructed by Panhandle Eastern will be operated as an integral part of its interstate transmission pipe-line system and used for the transportation and sale of natural gas, subject to the jurisdiction of the Commission. The 2-inch pipe line to be constructed by Eastern Indiana will be used for the transportation of natural gas, subject to the jurisdiction of the Commission. Therefore, the proposed construction and operation of each of

such lines are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act, as amended.

(3) Upon completion of the proposed facilities Eastern Indiana proposes to engage in the transportation of natural gas subject to the jurisdiction of this Commission, and it, therefore, will be a "natural-gas company" within the meaning of the Natural Gas Act.

(4) Panhandle Eastern and Eastern Indiana are able and willing properly to do the acts, and perform the service proposed and to conform to the provisions of the Natural Gas Act, as amended and the requirements, rules, and regulations of the Commission thereunder.

[fol. 126] (5) The proposed construction and operation are and will be required by the present and future public convenience and necessity, and certificates authorizing such proposed construction and operation should be issued, as hereinafter ordered and conditioned.

(6) It will be consistent with the public interest to permit Greenfield to withdraw its application in Docket No. G-587 and Eastern Indiana to withdraw its application in Docket No. G-608, in so far as the latter application requests a certificate for authority to construct the proposed 3-inch pipe line to Fortville and to terminate the proceedings thereon as hereinafter ordered.

The Commission *orders* that:

(A) A certificate of public convenience and necessity be and it is hereby issued to Panhandle Eastern in Docket No. G-607 authorizing the construction and operation of the proposed 3-inch pipe line to Fortville, Indiana, together with the appurtenant facilities necessary for rendering service to Greenfield and Eastern Indiana for the transportation and sale of natural gas to such customers, subject to the jurisdiction of the Commission, upon the terms and conditions of this order.

(B) A certificate of public convenience and necessity be and it is hereby issued to Eastern Indiana in Docket

No. G-608 authorizing the construction and operation of the proposed 2-inch pipe line, extending from the proposed 3-inch line to be constructed by Panhandle Eastern, to the town of Ingalls, Indiana, for the transportation of natural gas, subject to the jurisdiction of the Commission, upon the terms and conditions of this order.

(C) Greenfield be and it is hereby permitted to withdraw its application in Docket No. G-587, and Eastern Indiana is hereby permitted to withdraw its application in Docket No. G-608 in so far as the latter application requests a certificate to construct the proposed 3-inch pipe line to Fortville. The proceedings on such applications are hereby terminated.

(D) The certificate granted to Panhandle Eastern is issued upon the express condition that the facilities herein authorized shall not be used for either the transportation or sale of natural gas, subject to the jurisdiction of this Commission, to any new customers except upon specific authorization by this Commission.

(E) Panhandle Eastern and Eastern Indiana shall complete the construction of the facilities herein authorized on or before September 30, 1945, and shall report to the commission in writing, under oath, the [fol. 127] dates of completion and commencement of operation of such facilities.

(F) The certificates herein granted shall not be transferable and are without prejudice to the authority of this Commission or any other regulatory body with respect to rates, contracts, service, accounts, valuation, estimate or determination of cost, or any other matter whatsoever now pending or which may come before this Commission or other regulatory body, and nothing herein shall be construed as an acquiescence, by this Commission in any estimate or determination of cost or any valuation of property claimed or asserted.

(G) Nothing herein is to be construed as affecting in any manner the determination of the service areas of the Applicants under Section 7(f) of the Natural Gas Act, as amended.

(H) Nothing contained in this order shall be construed as in any manner changing or affecting the Commission's Opinion No. 80 and accompanying order reducing rates, entered September 23, 1942, in Docket Nos. G-200 and G-207 (3 F.P.C. 273, 292), or in any manner relieving Panhandle Eastern from filing new rate schedules reflecting the reduction in rates in conformity therewith.

(I) The certificates herein granted shall be effective as long as Panhandle Eastern and Eastern Indiana continue the operations hereby authorized in accordance with the provisions of the Natural Gas Act, as amended, and any pertinent rules, regulations, or orders heretofore or hereafter issued by the Commission.

(J) Appropriate evidence of the issuance of these certificates shall be furnished to Panhandle Eastern and Eastern Indiana.

By the Commission.

(S) Leon M. Fuquay, Secretary.

[fol. 128] EXHIBIT Q-2 TO STIPULATION OF FACTS.

Docket No. G-587, Docket No. G-607, Docket No. G-608

In the Matters of

GREENFIELD GAS COMPANY, INC., and GREENFIELD GAS
Co., Inc.,

v.

PANHANDLE EASTERN PIPE LINE COMPANY

PANHANDLE EASTERN PIPE LINE COMPANY

EASTERN INDIANA GAS COMPANY

APPLICATION OF PANHANDLE EASTERN PIPE LINE COMPANY
FOR MODIFICATION OF ORDER, OR IN THE ALTERNATIVE FOR
REHEARING

Comes now Panhandle Eastern Pipe Line Company and files its application for modification of the order heretofore entered by the Commission on June 5, 1945, in the above

numbered dockets or, in the alternative, files its application for rehearing herein, and in support thereof respectfully submits:

1. In its application, filed with the Commission on December 18, 1944 (Docket No. G-607), Panhandle Eastern sought authority to construct 3.7 miles of three inch pipe line in Hancock County, Indiana, from a point on its four inch pipe line (known as the "Greenfield Lateral Line") to the corporate limits of Fortville, Indiana, as fully described in said application and in the "Exhibit B" attached thereto. The construction and operation of the said line and appurtenant facilities contemplate natural gas service to Eastern Indiana Gas Company at the said town of Fortville, and also at the towns of Ingalls and McCordsville, Indiana, as well as the supplying of the fuel requirements of the E. I. DuPont de Nemours & Company, which latter company has a plant situated at the outskirts of the said town of Fortville; service is also contemplated to Greenfield Gas Company, Inc., at the said town of Fortville.

[fol. 129] 2. In its said order of June 5, 1945, the Commission granted Panhandle Eastern a Certificate of Public Convenience and Necessity for the construction and operation of the proposed facilities and authorized it to render gas service to the said Eastern Indiana and Greenfield Gas Companies. No action was taken by the Commission, however, in the said order with respect to the delivery of gas to the chemical plant of E. I. DuPont de Nemours & Company, located at Fortville, Indiana. Concerning the said proposed service, the Commission recited in paragraph "(h)" of the said order that:

"However, the War Production Board has not approved such deliveries of gas, and, inasmuch as the commencement of this service is indefinite, no action should be taken with respect thereto at this time."

3. On June 15, 1945, War Production Board addressed a Communication to Panhandle Eastern advising it of the relaxation of certain wartime controls and of "modification in the application of certain provisions of Utilities Order U-7." In said communication, Panhandle Eastern is further advised that, pursuant to the said modification,

it (Panhandle Eastern) is exempted from the restrictions on new deliveries of gas imposed by paragraphs "(d)" and "(e)" of the said Order U-7. A photostatic copy of the said communication, together with a copy of War Production Board's Order U-7, as amended, are hereto attached and marked "Exhibit A" and made a part hereof.

4. Applicant further submits that, as disclosed in the evidence in the public hearing herein, the construction and operation of the aforesaid lateral line by Panhandle Eastern would not be economically feasible, in the absence of the sale and delivery of gas by Panhandle Eastern under the contract entered with the said DuPont Company, which is a part of the record of this proceeding (Exhibit 26). It is further submitted that the aforesaid contract with the DuPont Company provides that deliveries of gas thereunder [fol. 130] by Panhandle Eastern are to commence no later than September 1, 1945.

5. Applicant submits, further, that on June 20, 1945, it received a telegram from the said DuPont Company advising that "Delay in gas supply will hold up peak production of war supplies." A confirmation copy of the said telegram is hereto attached, marked "Exhibit B," and made a part hereof.

Wherefore, Panhandle Eastern respectfully requests that the said order of June 5, 1945, be modified so as to include authorization for the construction and operation of the necessary facilities for the delivery of gas by Panhandle Eastern to the DuPont Company, under the provisions of the aforesaid contract, and submits that, under the provisions of Section 19(a) of the Natural Gas Act, such modification of the said order may be made without further hearing herein. In the alternative, however, and without waiving the request for modification without hearing, Panhandle Eastern requests a rehearing for the purpose of effectuating the said modification.

In view of the limited time provided for in paragraph "(E)" of the said order, for the completion of the construction of the facilities therein authorized, and of the time limit fixed in the said DuPont contract for the beginning of deliveries of gas thereunder, Panhandle Eastern

respectfully requests that this matter be acted upon by the Commission at an early date.

Respectfully submitted, Panhandle Eastern Pipe Line Company, By: (Signed) Hy Byrd, Vice President.

John S. L. Yost, S. H. Riggs, 135 S. La Salle Street, Chicago, Illinois, Counsel for Panhandle Eastern Pipe Line Company.

[fol. 131] STATE OF ILLINOIS,
County of Cook, ss:

Hy Byrd, being first duly sworn, on oath says that he is Vice President of Panhandle Eastern Pipe Line Company, applicant herein; that he has read the foregoing application and knows the contents thereof and that the same is true of his own knowledge.

(Signed) Hy Byrd.

Sworn to and subscribed to before me by Hy Byrd this 22nd day of June, 1945. (Signed) Ralph Edward McCarthy, Notary Public. My Commission expires February 14, 1948.

[fol. 132] EXHIBIT Q-3. TO STIPULATION OF FACTS

Docket No. G-587. Docket No. G-607. Docket No. G-608

In the Matter of

GREENFIELD GAS COMPANY, INC., and GREENFIELD GAS
COMPANY, INC.

v.

PANHANDLE EASTERN PIPE LINE COMPANY

PANHANDLE EASTERN PIPE LINE COMPANY

EASTERN INDIANA GAS COMPANY

Answer of Public Service Commission of Indiana, to Application of Panhandle Eastern Pipe Line Company, for Modification of Order, or in the Alternative for Rehearing

Comes now the Public Service Commission of Indiana, intervenor herein, and for answer to the application of

Panhandle Eastern Pipeline Company for modification of the order of the Commission entered on June 5th, 1945, in the above numbered docket, or alternative application for rehearing herein, respectfully represents to the Commission, as follows: to-wit:

1. That the order heretofore entered by the Federal Power Commission in this cause is within the authority granted to it by the Natural Gas Act, but that any modification of said order to permit service or sale of natural gas by said Panhandle Company direct to any consumer within the State of Indiana would be without the express provisions of Section 1(b) of said Natural Gas Act.

2. That it is the position of this Commission that the proposed sale direct to a consumer by said Panhandle Company is entirely intrastate commerce, and that in order so to engage, the Panhandle is required to comply with the laws of this state relative thereto. That there is no evidence nor is there any allegation in said answer that [fol 133] the Panhandle Eastern Pipe Line Company has secured from the Public Service Commission of Indiana, a Necessity Certificate for them to serve the E. I. DuPont DeNemours and Company, as proposed in their application for modification, as required by the laws of the State of Indiana, particularly by Chapter 53, Acts of 1945, Indiana, effective as of February 26, 1945.

3. That said Panhandle Eastern Pipe Line Company has not heretofore had and does not now have a Necessity Certificate, as required by law, from the Public Service Commission of Indiana, and has not heretofore had and does not now have on file with and approved by said Public Service Commission, any schedule of rates, rules or regulations covering sale of natural gas by it to consumers in the State of Indiana, nor have they filed with the Public Service Commission of Indiana, any annual or other reports in respect to the operation within the State of Indiana necessary under the provisions of the Public Service Commission Act and orders of said Commission applicable thereto.

4. That the Public Service Commission of Indiana objects to the modification of said order, as requested by said Panhandle Eastern Pipe Line Company, unless such modification includes a condition that said Panhandle Eastern

Pipe Line Company shall not supply natural gas to the DuPont Company, the proposed consumer in Indiana, until and unless said Panhandle Eastern Pipe Line Company has first applied for and received from the Public Service Commission of Indiana, the Necessity Certificate covering gas utility service direct to a consumer in Indiana, which is required and provided for by the statutes of the State of Indiana now in force and effect.

[fol. 134] Wherefore, the Public Service Commission of Indiana requests that the prayer of the application of Panhandle Eastern Pipe Line Company for modification be denied, and in the event that your honorable commission does not deny the prayer of the applicant, Panhandle Eastern Pipe Line Company, then and in that event the Public Service Commission of Indiana prays that the modification of said order include a condition that said Panhandle Eastern Pipe Line Company shall not supply natural gas to the E. I. DuPont DeNeumours and Company, the proposed consumer in Indiana, direct, until and unless said Panhandle Eastern Pipe Line Company has first applied for and received from the Public Service Commission of Indiana the Necessity Certificate covering gas utility service direct to a consumer in Indiana which is required and provided for by the statutes of the State of Indiana now in force and effect.

Public Service Commission of Indiana by (Sgd.)
Laurence E. Carlson, Commissioner.

[fol. 135] EXHIBIT Q-4 TO STIPULATION OF FACTS

UNITED STATES OF AMERICA, FEDERAL POWER COMMISSION

Before Commissioners: Basil Manly, Chairman; Claude
L. Draper, Leland Olds and Nelson Lee Smith

July 10, 1945

Docket No. G-587. Docket No. G-607. Docket No. G-608

In the Matters of

GREENFIELD GAS COMPANY, INC., and GREENFIELD GAS
COMPANY, INC.

v.

PANHANDLE EASTERN PIPE LINE COMPANY

PANHANDLE EASTERN PIPE LINE COMPANY

EASTERN INDIANA GAS COMPANY

ORDER MODIFYING ORDER ISSUING CERTIFICATES OF PUBLIC
CONVENIENCE AND NECESSITY

It appears to the Commission that:

(a) By order of June 5, 1945, the Commission issued a certificate of public convenience and necessity to Panhandle Eastern Pipe Line Company (Panhandle Eastern) in Docket No: G-607 authorizing the construction and operation of 3.7 miles of 3-inch diameter pipeline extending from Panhandle Eastern 4-inch Greenfield lateral transmission line in a westerly direction to the town of Fortville, Indiana, for the transportation and sale of natural gas to Greenfield Gas Company, Inc. (Greenfield) and Eastern Indiana Gas Company (Eastern Indiana) for resale in the Fortville area.

(b) In its original application filed December 18, 1944, and at the hearing in these matters, Panhandle Eastern stated that, in addition to supplying natural gas to Greenfield and Eastern Indiana, it also proposed to use the new facilities for the transportation and sale of natural gas to E. I. du Pont de Nemours (du Pont) for the latter's fuel requirements at its chemical

plant on the outskirts of Fortville. Evidence with respect to such sale was adduced at the hearing on the original applications in these matters.

(c) As stated in paragraph (h) of the June 5, 1945 order, the War Production Board had not then approved the proposed direct sale of gas to the du Pont plant, and inasmuch as the commencement of such proposed service was indefinite, the Commission took no action with respect thereto at that time.

[fol. 136] (d) On June 29, 1945, Panhandle Eastern filed an application for modification of the order of June 5, 1945, to authorize the proposed sale of natural gas to the du Pont plant at Fortville. Such application states that the War Production Board's restrictions on such sale have been removed; that du Pont requires the gas for the production of war supplies; and that the proposed pipeline will not be economically feasible unless the sale to the du Pont plant is made. By instruments dated June 27, 1945, and June 28, 1945, Greenfield and Eastern Indiana, respectively, consented to a request for the modification of the Commission's order of June 5, 1945.

(e) On July 7, and 9, 1945, the Public Counsellor of Indiana, and the Public Service Commission of Indiana, respectfully, filed answers to Panhandle Eastern's requested modification, stating that Panhandle Eastern has not obtained a "necessity certificate" from the Public Service Commission of Indiana authorizing the proposed sale of natural gas to du Pont. The Public Service Commission of Indiana alleged, additionally, that this Commission's June 5, 1945, order was a valid exercise of authority under the Natural Gas Act but that "any modification of said order to permit service or sale of natural gas by said Panhandle Company direct to any consumer within the State of Indiana would be without the express provisions of Section 1(b) of said Natural Gas Act." It is further contended by the Indiana Commission that such proposed sale of gas "is entirely intrastate commerce, and that in order so to engage, the Panhandle is required to comply with the laws of this State rel-

ative thereto." Both answers request that Panhandle Eastern's requested modification be denied or, in the alternative, that such modification not be granted until Panhandle Eastern first obtains from the Indiana Commission authorization for the proposed sale to du Pont.

The Commission, having considered the aforesaid documents filed by the parties and the record herein with respect to the matters involved and the issues presented, finds that:

(1) The proposed sale of natural gas by Panhandle Eastern to du Pont requires the transportation of natural gas subject to the jurisdiction of the Commission, and such operation and service are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act, as amended.

(2) Panhandle Eastern is able and willing properly to do the acts, and perform the service proposed and to conform to the provisions of the Natural Gas Act, as amended, and the requirements, rules, and regulations of the Commission thereunder.

(3) The proposed transportation and service by Panhandle Eastern to E. I. du Pont de Nemours are and will be required by the present and future public convenience and necessity, and the order of June 5, 1945, issuing a certificate to Panhandle Eastern should be modified to permit such service and operation as hereinafter ordered and conditioned.

The Commission orders that:

(A) The certificate of public convenience and necessity issued by the Commission's order of June 5, 1945, in these matters be and it is hereby modified to authorize Panhandle Eastern's transportation and service of natural gas to du Pont, subject to the jurisdiction of the Commission, as described in the record in this proceeding.

(B) This order is without prejudice to the authority of the Indiana Commission in the exercise of any jurisdiction which it may have over the sale or service proposed to be rendered by Panhandle Eastern to du Pont.

(C) Panhandle Eastern shall report to the Commission promptly in writing, under oath, the date of commencement of deliveries of natural gas to du Pont.

(D) Except as herein modified, the provisions of the Commission's order of June 5, 1945, in these matters, including all conditions, shall remain in full force and effect.

By the Commission.

Leon M. Fuquay, Secretary.

[fols. 138-139] EXHIBIT Q-5 TO STIPULATION OF FACTS

Federal Power Commission

Evidence of Issue of

Certificate of Public Convenience and Necessity

UNITED STATES OF AMERICA,
District of Columbia, ss:

It is hereby Certified, that the Federal Power Commission has found that Panhandle Eastern Pipe Line Company has duly complied with the applicable provisions of Section 7c of the Natural Gas Act, as amended, and the rules and regulations prescribed by the commission thereunder, and, by Order of the Commission of June 5, 1945, in the matter of Panhandle Eastern Pipe Line Company, Docket No. G-607, has been issued a Certificate of Public Convenience and Necessity authorizing the said Panhandle Eastern Pipe Line Company to construct and operate facilities for the transportation and sale for resale of natural gas in interstate commerce, to the extent and subject to the terms and conditions specified in said order and certificate.

Witness whereof the seal of the Federal Power Commission and the hand of its secretary, at Washington, D. C., this 30th day of August, A. D. 1945.

Leon M. Fuquay, Secretary.

[fol. 140] BEFORE THE PUBLIC SERVICE COMMISSION OF
INDIANA

Cause No. 16741

In the Matter of the Investigation by the Commission in
Respect of the Distribution by Panhandle Eastern Pipe
Line Company, as a Public Utility, of Natural Gas to
Consumers within the State of Indiana

Order and Opinion. Approved Nov. 21, 1945

COMMISSION ORDER

Appearances:

For the Commission: Frank Coughlin, Urban C. Stover,
Deputy Attorneys General.

For the Public: Glenn R. Slenker, Public Counsellor; Robert E. Jones, William F. Dudine, Assistant Public Counsellors.

[fol. 141] For Respondent, Panhandle Eastern Pipe Line Company: John S. Yost, Crumpacker, May, Carlisle & Beamer, by George N. Beamer; Barnes, Hickam, Pantzer & Boyd, by Kurt F. Pantzer, Allen W. Boyd.

For Intervenor, Central Indiana Gas Company: George B. Pidot, VanAtta, Batton & Harker, by Robert R. Batton.

For Intervenor, Greenfield Gas Company, Inc.: William A. McClellan.

For Intervenor, Kokomo Gas & Fuel Company: John E. Fell.

For Intervenor, Northern Indiana Public Service Company: Lawyer & Anderson, by John S. Lawyer, R. Stanley Anderson.

For Intervenor, Public Service Company of Indiana, Inc.: Evans & Hebel, by William P. Evans, Edmond W. Hebel.

For Intervenor, Southern Indiana Gas & Electric Company: Ortmeier, Bamberger & Ortmeier, by Edmund F. Ortmeier.

By the Commission

CANNON, Commissioner:

On October 13, 1944, the following order in this cause No. 16741 was issued by this Commission, to-wit:

[fol. 142] "Public Service Commission of Indiana, having summarily upon its own motion investigated

the matter of the operations of Panhandle Eastern Pipe Line Company in distributing natural gas as a public utility within the State of Indiana, has reason to believe that said Panhandle Eastern Pipe Line Company has heretofore, without the approval of this Commission, purported to take over and acquire certain property and franchise rights used and useful in rendering public utility natural gas service to consumers within the State of Indiana, that said Panhandle Eastern Pipe Line Company has heretofore and is now engaged, as a public utility, in the retail sale of natural gas within the State of Indiana, that said Panhandle Eastern Pipe Line Company has not heretofore had and does not now have on file with and approved by this Commission any schedule of rates, rules and regulations covering sales of natural gas by it to consumers in the State of Indiana, that said Panhandle Eastern Pipe Line Company has not filed with this Commission any annual or other reports in respect of its operations within the State of Indiana, and that said Panhandle Eastern Pipe Line Company may in various respects be violating provisions of the Public Service Commission Act and orders of this Commission applicable to it and its operations.

And it appearing to this Commission from its said investigation that sufficient grounds exist to warrant a formal hearing being ordered as to the matters heretofore investigated, this commission hereby furnishes to said Panhandle Eastern Pipe Line Company, pursuant [fol. 143] to the requirements of Section 62 of the Public Service Commission Act, this statement notifying said Panhandle Eastern Pipe Line Company of the matters under investigation, which are as follows, to-wit:

1. The facts and circumstances under which said Panhandle Eastern Pipe Line Company has purported to acquire and hold any property, or franchise or other rights, used or useful in or in connection with sales of natural gas to the Anchor-Hocking Glass Corporation, a consumer of natural gas within the State of Indiana, or to any other consumer or consumers of natural gas within the State of Indiana.

2. The nature, period and extent of natural gas service by said Panhandle Eastern Pipe Line Company to said Anchor-Hocking Glass Corporation, or any other consumer of natural gas within the State of Indiana, and the right, if any, of said Panhandle Eastern Pipe Line Company to render any such service.

3. The matter of the failure of said Panhandle Eastern Pipe Line Company to file with this Commission any tariffs, rules and regulations appertaining to natural gas service to such consumer or consumers as it serves within the State of Indiana.

4. The matter of the failure of said Panhandle Eastern Pipe Line Company to file with this Commission an annual report for the calendar year 1942 and the calendar year 1943, or either of them.

5. The matter of the failure of said Panhandle Eastern Pipe Line Company to file with this Commission an original cost report appertaining to its property [fol. 144] used and useful in rendering natural gas service to consumers within the State of Indiana.

6. Whether or not said Panhandle Eastern Pipe Line Company is a corporation organized under the laws of the State of Indiana.

7. Whether or not said Panhandle Eastern Pipe Line Company now has, and has had at all times while it has been selling natural gas, to consumers within the State of Indiana, an office in the State of Indiana, and has kept thereat all books, accounts, papers and records required by this Commission to be kept within the State of Indiana.

8. Whether or not said Panhandle Eastern Pipe Line Company has failed to keep any book, account, paper or record required to be kept by it under the orders of this Commission or has failed to comply with any direction of this Commission relating to any such book, account, paper or record.

9. Whether or not said Panhandle Eastern Pipe Line Company in any other respect is failing or has failed to comply with, abide by and conform with any applicable provisions of the Public Service Commis-

sion Act or of the orders and regulations of this Commission.

Dated at Indianapolis, Indiana, this 13th day of October, 1944.

By order of the Public Service Commission of Indiana.

Hugh W. Abbett (S.), Chairman. (Seal.)

Attest: Glen L. Steckley (S.), Secretary."

[fol. 145] Abbett, Cannon and Barnard Concur:

(Approved: October 13, 1944

Due notice was given that this cause would be heard in the rooms of the commission, 401 State House, Indianapolis, Indiana, on November 20, 1944, at 2:00 P. M. Said notice was approved October 30, 1944 and is as follows:

"Whereas the Public Service Commission of Indiana, by its order made in the above entitled cause on October 13, 1944, determined that sufficient grounds existed to warrant a formal hearing being ordered as to matters under investigation by the Commission, as set out and contained in said order of October 13, 1944, and whereas a certified copy of said order of October 13, 1944, containing a statement of the matters under investigation was sent to the Panhandle Eastern Pipe Line Company by registered mail on October 14, 1944.

Now, therefore, the Commission sets this cause for public hearing upon the matters set out in said order of October 13, 1944, and all matters pertinent thereto, to be held at the Rooms of the Commission, 401 State House, Indianapolis, Indiana, on November 20, 1944, at 2:00 P. M.

It is further ordered that said Panhandle Eastern pipe Line Company shall appear at such hearing and shall produce testimony and evidence, consisting of its books, records, contracts and documents pertaining to the matters under investigation as set out in said order of October 13, 1944, and that at such [fol. 146] hearing opportunity will be afforded said Panhandle Eastern Pipe Line Company to produce any evidence it may offer pertaining to said matters under investigation.

The Secretary of this Commission is hereby ordered and directed to forward to said Panhandle Eastern Pipe Line Company, by registered mail, a certified copy of this order. Dated at Indianapolis, Indiana, this 30th day of October, 1944.

By order of the Public Service Commission of Indiana."

Abbett, Cannon and Barnard Concur:

Approved: October 30, 1944

Said notice was duly printed and published in the Winchester News, a newspaper of general circulation printed in the English language and published in the City of Winchester (Randolph County, Indiana, on November 1, 1944; also in The Indianapolis Times, a newspaper of general circulation printed and published in the English language in the City of Indianapolis, Marion County, Indiana, on November 1, 1944; also in the Hoosier Sentinel, a newspaper of general circulation printed and published in the English language in Indianapolis, Marion County, Indiana, on November 3, 1944, and also in the Times Gazette, a newspaper of general circulation printed and published in the English language in the City of Union City, Randolph County, Indiana, on November 9, 1944.

Said notice was duly received by the respondent Panhandle Eastern Pipe Line Company (Panhandle).

[fol. 147] In response to the notice dated October 30, 1944, Panhandle alleged that "any action or order of the Public Service Commission of Indiana herein purporting to regulate, interfere with, or otherwise affect the sale and delivery by Panhandle Eastern Pipe Line Company to Anchor-Hocking Glass Company of natural gas transported by Panhandle in interstate commerce would unduly and unlawfully burden interstate commerce in violation of Article 1, Section 8 (3) of the Constitution of the United States, and that if sections 54-112 et seq. Burns Indiana Statutes Annotated, 1933, or any other Indiana statute, is construed to purport to authorize said commission to regulate, interfere with or otherwise affect such sale and delivery, such statutes as so construed are unconstitutional and void because in violation of Article 1, Section 8 (3) of the Constitution of the United States, and denies:

- (a) that it sells natural gas in Indiana except as a part of interstate commerce;

(b) that it is engaged in intrastate commerce in the State of Indiana;

(c) that it has transacted or is transacting within the State of Indiana any business as a public utility within said state;

(d) that the sale and delivery of natural gas transported by it in interstate commerce directly to an industrial consumer is subject to the jurisdiction of the Public Service Commission of Indiana;

[fol. 148] (e) that it is in any manner subject to the jurisdiction of said commission;

(f) that said commission has any right, power or authority to institute this proceeding against it;

(g) that the statutory provisions under which this action is instituted (Secs. 54-412, et seq. Burns Indiana Statutes Annotated, 1933) authorizing investigation by said commission of matters relating to any public utility, have any application to it or its business;

(h) that it is under any obligation to comply with any Indiana statute or any order of said commission relating to public utilities within the State of Indiana; and.

(i) that its business or any part thereof is subject to regulation of any character by said commission."

On or prior to November 20, 1944, Central Indiana Gas Company (Central Gas), Greenfield Gas Company, Inc. (Greenfield Gas), Kokomo Gas & Fuel Company (Kokomo Company), Northern Indiana Public Service Company (Northern Company), Public Service Company of Indiana, Inc. (Service Company) and Southern Indiana Gas & Electric Company (Southern Indiana), each of which was a public utility engaged in supplying natural gas to consumers within the State of Indiana, filed with the Commission respective applications for leave to intervene and be heard in this cause. At the hearing on November 20, [fol. 149] 1944, the Commission considered said applications and granted each of said applicants leave to intervene and be heard herein.

At said hearing, all appearances were entered as above stated except that Mr. Frank Coughlin, Mr. Urban C.

Stover, Mr. Glenn R. Slenker, Mr. Robert E. Jones, Mr. George B. Pidot, Mr. Kurt Pantzer, Mr. R. Stanley Anderson and Mr. William P. Evans entered their respective appearances for their respective clients at later hearings of this cause.

At the hearing on November 20, 1944, it was, with the approval of the Commission, agreed between the Public Counsellor, counsel for Panhandle and the respective counsel for the intervenors that the parties to the proceedings would endeavor to agree upon, and would file in this cause, a Stipulation of Facts; that any stipulated facts would be subject to objection as to relevancy and materiality by any party thereto if such objection was made within such time as the Commission should fix; and that the stipulated facts could be supplemented and other facts could be shown by oral testimony taken and exhibits offered at a hearing.

The hearing was then continued to December 4, 1944, to permit time for the working out of the proposed Stipulation of Facts. By subsequent orders of the Commission the date of further hearing was further continued from time to time to January 9, 1945, at which date a Stipulation of Facts (Stipulated Facts), dated January 9, 1945, signed by the Public Counsellor, counsel for Panhandle [fol. 150] and counsel for all the respective intervenors was introduced and received in evidence. At such hearing, counsel for Panhandle, filed objections to the relevancy and materiality of certain parts of the evidence contained in the Stipulated Facts; and the Public Counsellor and counsel for the intervenors all advised the Commission that they raised no objections to the reception and consideration by the Commission of any of the Stipulated Facts. At said hearing the parties in this cause also advised the Commission that they had been unable to agree upon a stipulation in respect of certain matters, and requested the Commission to fix a time for the taking of oral evidence and the production of exhibits in respect of such matters or of matters supplementary to the Stipulated Facts which any of the parties might desire to offer. The Commission fixed February 6, 1945, as the date for such further hearing. Subsequently by orders of the Commission the date for such hearing was, for cause shown, continued from time to time until March 28, 1945, at which time a Stipulation of Evidence, including exhibits thereto, were offered by all the parties hereto, and oral testimony and exhibits were offered

by the Public Counsellor and by certain of the intervenors. Most of such proffered evidence was received by the Commission, subject to its later ruling upon objections by counsel for Panhandle to the relevancy and materiality of certain parts thereof.

The evidence offered in this cause consists of the following:

[fol. 151] A. The Stipulated Facts, including the exhibits attached thereto as a part thereof.

B. A Stipulation of Evidence, dated March 28, 1945, including the exhibits attached thereto as a part thereof.

C. Oral testimony presented at the hearing on March 28, 1945, by William F. Lebo, then the Acting Chief Engineer of the Commission and now its Chief Engineer, who was called as a witness by the Public Counsellor, and by L. B. Schiesz, First Vice-president of Service Company, by Guy T. Henry, President of Central Gas, and by Edward M. Hahn, President and General Manager of Kokomo Company, who were called as witnesses by the respective respondents with which they are connected.

D. The record of the testimony of Oscar W. Morton, Rate Engineer of Panhandle, before the Federal Power Commission on February 26, 1945.

E. Supplemental Stipulation of Facts, dated October 3, 1945, including the exhibits attached thereto as a part thereof.

F. The following exhibits (in addition to the exhibits attached to and identified in the Stipulated Facts, the Stipulation of Evidence and the Supplemental Stipulation of Facts):

Commission:

No. 1—Proof of publication of notice of hearing in the Gazette, Winchester, Indiana.

[fol. 152] No. 2—Proof of publication of notice of hearing in the The Indianapolis Times, Indianapolis, Indiana.

No. 3—Proof of publication of notice of hearing in the Hoosier Sentinel, Indianapolis, Indiana.

No. 4—Proof of publication of notice of hearing in the Times Gazette, Union City, Indiana.

No. 5—Notice of investigation in this cause, issued by the Commission on October 13, 1944.

No. 6—Order issued by the Commission in this matter on October 30, 1944, setting this matter for hearing.

Public Counsellor:

No. 1—Analysis of sales of gas to ultimate consumers in Indiana and statement of gas property and plant investment, etc.

No. 2—Copy of resolution as adopted by Board of Directors of Panhandle on March 19, 1945.

Service Company:

No. 1—Map showing gas facilities of Service Company.

No. 2—Statement showing gas utility statistics of Service Company.

No. 3—Statement showing gas utility net operating income and pro forma operating income of Service Company.

[fol. 153] Central Indiana:

No. 1—Statement showing gas utility net operating income and pro forma operating income of Central Indiana.

Kokomo Company:

No. 1—Statement showing gas utility statistics of Kokomo Company.

No. 2—Statement showing gas utility net operating income and pro forma operating income of Kokomo Company.

It was agreed between the Commission and the parties to this cause, that the objections to the relevancy or mate-

riality of the evidence, which were made by any party hereto and were not acted on by the Commission at the time made, should be argued in briefs to be filed, and in oral argument; and should thereafter be ruled upon by the Commission.

Following the hearing on March 28, 1945, briefs and reply briefs were filed by the Public Counsellor, intervenors and Panhandle. On October 3, 1945, this Commission heard oral arguments in this cause, at which time additional briefs were presented by Central Gas and by Panhandle.

The Commission is fully appreciative of the public importance of the issue here under investigation. Because of this fact, it has been anxious throughout these proceedings to afford the interested parties ample opportunity to present fully to the Commission their respective views [fol. 154] upon the matters involved. It has sought, too, such full factual information as would shed light upon any phase of the regulatory problem which the Commission has before it in this investigation. The fundamental issues involved are not narrow ones and the Commission feels that it has a better background for dealing with the public issues here at stake if it has before it the full history of the development of the natural gas utility business in Indiana, of the place of Panhandle and its predecessors in that development, of the activities that Panhandle is carrying on or may be endeavoring to carry on, and of the possible effect of such activities upon the effectiveness of regulation of direct consumer sales in Indiana and upon the interest of the gas consuming public in Indiana. The Commission believes that all of the evidence adduced in this cause directly sheds light upon such matters.

Prior to this investigation, the Commission had never been supplied with information as to the activities of Panhandle within the state. When the supplying of direct consumer gas service was commenced by Panhandle in Indiana it did not file, and has at no time since filed, with the Commission any reports, tariffs or regulations. The evidence in this investigation supplies in part such information as the Commission would normally have from required reports. In an investigation of this kind—an investigation by a regulatory agency on its own motion and for purposes of determining its regulatory duties—no narrow conception of the restriction of factual information

should be adopted. The Commission concludes, therefore, [fol. 155] that all the evidence presented in this cause should be received by it as a part of the record in this cause, and that each and all of the objections of Panhandle to the relevancy or materiality of any evidence offered should be overruled; and it will be so ordered.

Findings of Facts

The Commission, having heard and considered the evidence presented in this cause and being duly advised in the premises finds that the evidence in this cause establishes facts which are summarized and found as follows:

1. Panhandle, a Delaware corporation, at and prior to sometime in the year 1931, had constructed its main transmission line extending from the Amarillo Gas Field in the Texas Panhandle and the Hugoton Gas Field in southwestern Kansas through the States of Oklahoma, Kansas, Missouri and Illinois, to a point near the Indiana-Illinois state line. In 1932 the eastern end of this line was interconnected near Dana, Indiana, with gas transmission lines built by Indiana Gas Transmission Corporation (Indiana Transmission), a Delaware corporation, extending to Zionsville, Indiana, and to Muncie, Indiana. Near Muncie, said line interconnected with gas transmission lines from Ohio owned and operated by Ohio Fuel Gas Company (Ohio Fuel), an Ohio corporation. Early in 1936, Indiana Transmission was merged into Michigan Gas Transmission Corporation (Michigan Gas), a Delaware corporation, and the line to Zionsville was extended eastward across [fol. 156] Indiana, the northwest corner of Ohio, and Michigan to a point near Detroit, Michigan. Indiana Transmission, Michigan Gas and Ohio Fuel were all subsidiaries of Columbia Gas & Electric Corporation (Columbia Gas), a Delaware corporation, or its affiliates. The relationship of Columbia Gas and its affiliates and Panhandle are set forth in Findings made and an Opinion given by the Securities and Exchange Commission on May 27, 1941, in Files numbered 31-106, 31-107, 31-108, 31-109, 31-422, 31-423 and 31-493 pending before it, which Findings and Opinion are a part of the record in this cause as "Exhibit D" in the Stipulated

Facts. On February 6, 1942 Panhandle acquired from Columbia Gas or subsidiaries all the stock of Michigan Gas and the gas facilities in Indiana of Ohio Fuel. On March 31, 1943, Panhandle liquidated Michigan Gas and acquired directly all its properties. Said line and appurtenant facilities as presently constituted, consist of 22-inch, 24-inch and 26-inch transmission mains, branch lines, dehydration plants, gasoline plant, compressor stations and related facilities incidental to the transmission and delivery of such natural gas. As a result of the completion of Panhandle's 1943 construction program, an additional continuous parallel mains runs from a point near Liberal, Kansas, to a point 68.8 miles northeast of Zionsville, Indiana, and from a point near Edgerton, Indiana, to a point in Ohio 18.2 miles northeast of Edgerton. The details of the development of this gas transmission system, and the operation thereof, is shown by Stipulated Facts and particularly in Section VI, Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 thereof and the supporting exhibits therein referred to and made a part thereof [fol. 157] as "Exhibits A to H-3 both inclusive. The gas fields and the transmission system are shown more fully on the map, which is a part of the Stipulated Facts as "Exhibit C."

2. Said gas transmission line and other facilities were constructed, or acquired, for the purpose of transporting natural gas from the said gas fields in Texas and Kansas to the intervening States, including the State of Indiana, and the Detroit area and selling such gas directly or indirectly to the public; and Panhandle is now engaged, and it, or the related Columbia Gas Subsidiaries, have continuously since such construction and acquisition, been engaged in the business of furnishing such natural gas in the State of Indiana and elsewhere, directly or indirectly, to all types of consumers, residential commercial and industrial. At the present time, Panhandle holds a Certificate of Admission issued to it on September 19, 1935, by the Secretary of State for Indiana, authorizing it to transact business in the State of Indiana as a foreign corporation, which recites that the character

of business, under its Articles of Incorporation, which it is authorized to transact in Indiana, is as follows:

"To engage in the business of transmitting and transporting natural gas, artificial gas, mixtures of natural and artificial gases, oil and any by-product thereof, in, into, through and from the State of Indiana and any other state except the State of Delaware, and of supplying gas and other of said articles so transmitted and transported by it to other corporations, public or private or persons, firms, associations or [fol. 158] other organizations, engaged in the business of supplying gas or other of said articles to the public.

"To lay, construct, purchase, lease or otherwise acquire, hold, own, improve, maintain and operate, pipe lines and mains for the transmission and transportation of gas and said other articles as aforesaid, and to sell, lease or otherwise dispose of the same.

"To produce or purchase or otherwise acquire, store and transmit such gas, and said other articles, and to sell or otherwise dispose of the same to corporations, persons, firms, associations or other organizations as aforesaid.

"To purchase, lease, take, in exchange, or acquire in any other manner now or hereafter authorized by law, hold, possess, improve, construct, develop, deal in and sell, convey, assign or otherwise dispose of any and all property of every kind and description, real, personal or mixed, necessary, convenient or suitable for the purposes of the Corporation, including, without limiting the foregoing, any and all rights of way, easements, interests, franchises, licenses and privileges in the same; provided, however, that the Corporation shall not acquire, own, hold or lease real estate in the State of Indiana except such as may be necessary for the proper carrying on of its legitimate business."

At the end of the above, there appears the following declaration, which the Commission judicially knows was copied from the application for admission made by Panhandle:

[fol. 159] "The business above described being for the purpose of interstate commerce only and not that of a public utility business in Indiana." (See "Exhibit B" attached to the Stipulated Facts.)

3. Panhandle sells and delivers in Indiana the natural gas transported by it (1) to other gas companies, including all of the intervenors except Southern Indiana, which purchasers distribute such gas to residential, commercial and industrial consumers served by them, and (2) to one industrial consumer, Anchor-Hocking Glass Corporation (Anchor-Hocking), served directly by Panhandle.

4. Prior to January 9, 1945 Panhandle filed with the Federal Power Commission its application under the Natural Gas Act for a certificate of convenience and necessity to construct in Indiana, as a part of its "general pipe line system", a 3-inch lateral line extending from one of its main lines to a point near the Town of Fortville, Indiana, and certain facilities, which line and facilities were to be used to transport in inter-state commerce, and to deliver, gas to be sold to two Indiana utilities for resale, and also, if a proposed contract with the E. I. DuPont de Nemours (DuPont) was consummated, to be sold directly to DuPont for consumption at its plant adjacent to said town. Subsequently to the filing of said application, but prior to January 9, 1945, said contract between DuPont and Panhandle was entered into. On June 5, 1945, after hearings, the Federal Power Commission entered its order on said application in which it granted a certificate to Panhandle to construct the proposed line, but specifically prohibited Panhandle from using the line for "either the [fol. 160] transportation or sale of natural gas, subject to the jurisdiction of" the Federal Power Commission, "to any new customers except upon specific authorization" by said commission. Under date of June 29, 1945 Panhandle filed with the Federal Power Commission an application for a modification, without hearing, of the aforesaid provisions of said order so as to permit the use of said line for the transportation of gas to be sold to DuPont, and the construction of certain additional facilities for such delivery and in said application represented that it had received authority from the war production board to supply gas to DuPont and that delay in such gas supply would hold up peak production of war supplies. On July 7, 1945 the Public Counsellor, and on July 9, 1945 this Commission, pro-

tested against the modification of the Order of June 5, 1945 prior to a showing that state laws had been complied with. The Federal Power Commission, on July 10, 1945 and without a hearing, modified its Order of June 5, 1945, so as "to permit such service and operation as" were thereafter in such order of modification "ordered and conditioned." Said order then provided:

"(A) The certificate of public convenience and necessity issued by the Commission's order of June 5, 1945, in these matters be and it is hereby modified to authorize Panhandle Eastern's transportation and service of the natural gas to Du Pont, subject to the jurisdiction of the Commission as described in the record of this proceeding.

"(B) This order is without prejudice to the authority of the Indiana Commission in the exercise [fol. 161] of any jurisdiction which it may have over the sale or service proposed to be rendered by Panhandle Eastern to Du Pont.

"(C) Panhandle Eastern shall report to the Commission promptly in writing, under oath, the date of the commencement of the deliveries of natural gas to Du Pont.

"(D) Except as herein modified, the provisions of the Commission's order of June 5, 1945, in these matters, including all conditions, shall remain in full force and effect."

On August 30, 1945, the Federal Power Commission issued to Panhandle in Docket No. G-607 a certificate of convenience and necessity authorizing it "to construct and operate facilities for the transportation and sale for resale of natural gas in interstate commerce, to the extent and subject to the terms and conditions specified in said order and certificate." Panhandle asserts, as of October 3, 1945, that the facilities were constructed but that DuPont was not yet ready to take gas. So far as the Commission is advised Panhandle has not since said date supplied any gas to DuPont in Indiana. (See Section VI, Paragraph 12 of the Stipulated Facts and "Exhibit J-1" and "Exhibit J-2" filed

therewith, and the Supplemental Stipulation of Facts and all exhibits filed therewith). Panhandle has not yet applied to this Commission for any Necessity Certificate authorizing it to render gas service direct to consumers within the rural area in which the plant of DuPont is located. Panhandle plans to sell all industrial customers within reach of its facilities in Indiana who meet Panhandle's requirements.

5. Panhandle does not directly sell in Indiana any gas to residential and commercial consumers, except that it does supply for a moderate charge gas for residential use to seven of its employees, who live in company owned houses located on Panhandle's property. As part of its obligation under certain right of way agreements in other States and similar arrangements with its own employees, Panhandle, throughout its entire system, is now rendering service to approximately 194 residential customers and the revenue therefrom for the year ended December 31, 1943, amounted to \$12,220.49. During the same year, revenue from direct industrial sales for the entire system amounted to \$1,559,195.24 and revenue from sales to other gas companies for resale amounted to \$22,072,005.40. Current sales are being made in approximately the same proportions.

6. Approximately 950,000 consumers are supplied directly or indirectly with gas from the Panhandle system, including more than 112,000 consumers in Indiana. The number of industrial consumers served directly by Panhandle in the entire system was 21 in 1943, and is 23 at the present time. The names of such consumers, the location of their plants at which natural gas is supplied by Panhandle and the years in which direct service of natural gas by Panhandle to such plants commenced are given in a table, which is shown on page 12 and forms a part of Section VI, Paragraph 13 of the Stipulated Facts.

[fol. 163] 7. For the 12 months period ending September 30, 1944, the amounts in thousands of cubic feet (M. C. F.) of gas purchased by the intervenors from Panhandle and resold by them to industrial consumers

and the revenue derived by the intervenors therefrom were as follows:

Company	M. C. F. Sales	Revenue
Central Gas	9,004,962	\$2,624,557.81
Kokomo Company	480,406	196,241.70
Northern Company	940,340	545,940.00
Service Company	1,978,605	812,631.80

8. Anchor-Hocking is engaged in its plant at Winchester, Indiana, in the manufacture of glassware and the natural gas purchased from Panhandle for use at the Winchester plant of Anchor-Hocking is used in the manufacture of products produced there. (See Section VI, Paragraph 14 of the Stipulated Facts.)

9. Central Gas serves natural gas purchased by it from Panhandle to more than 30 large industrial consumers which is delivered to them by Central Gas and used by them in their manufacturing plants in Indiana. Said industrial consumers include Hart Glass Division of Armstrong Cork Company, Ball Brothers Company, Foster-Forbes Glass Company, Owens-Illinois Glass Company, Slick Glass Corporation, Sneath Glass Company, The Warfield Company, Sterling Glass Division, Delco-Remy Division of General Motors Corporation, Indiana Steel and Wire Company, Johns-Manville Products Corporation, The National Tile Company and Warner Gear Company. (See Section VI, Paragraph 15 of the Stipulated Facts.)

[fol. 164] 10. Service Company serves natural gas purchased by it from Panhandle to 9 large industrial consumers in Indiana, which is used by them in their manufacturing plants in Indiana. Said industrial consumers include Aluminum Company of America, Chrysler Corporation, Ingersoll Steel and Disc Division of Borg-Warner Corporation and Ingram Richardson Company. (See Section VI, Paragraph 16 of the Stipulated Facts.)

11. Kokomo Company serves natural gas purchased by it from Panhandle to 6 large industrial consumers in Indiana, which is used by them in their manufacturing plants there. Said industrial consumers are Continental Steel Corporation, American Radiator and

Standard Sanitary Corporation, Haynes-Stellite Company, Kingston Products Corporation, Chrysler Corporation and Globe Stove and Range Company. (See Section VI, Paragraph 17 of the Stipulated Facts.)

12. Northern Company serves natural gas purchased by it from Panhandle to 72 large industrial consumers in Indiana, which is used by them in their manufacturing plants there. Said industrial consumers include General Electric Company, International Harvester Company, Studebaker Corporation and Phelps-Dodge Corporation. (See Section VI, Paragraph 18 of the Stipulated Facts.)

13. Panhandle, in Indiana, sells natural gas to Kentucky Natural Gas Corporation, which company resells all or the principal part of such natural gas to companies distributing, as public utilities, natural gas to residential, commercial and industrial consumers in [fol. 165] Indiana. Panhandle, in Indiana, also sells natural gas to the following companies or municipal corporations, which are public utilities or municipalities distributing such gas and the number and classification of gas consumers served by such gas from Panhandle are approximately, as follows:

[fol. 166]

Name of Company	Approximate Number of Customers Served:				
	Residential	Commercial	Industrial	Other	Total
Central Gas	31,384	1,322	103	none	32,809
Greenfield Gas	1,296	59	2	4	1,361
Indiana Gas Distribution Corp. (Indiana Gas)					2,070
Indiana-Ohio Public Service Co. (Ind.-Ohio Co.)	3,314	219	11		3,544
Kokomo Company	6,674	379	23		7,076
Lynn Natural Gas Company	265	28			293
Northern Company (Ft. Wayne District)	31,633	1,160	67	68	32,928
Pendleton Natural Gas Co.	617	39			656
Service Company	22,516	1,916	46	120	24,598
Richmond Service Co.					6,800
Town of Lapel					250
Town of Montezuma					100
Town of Pittsboro					116
Town of Roachdale					92
Total	97,699	5,122	252	192	112,699

[fol. 167] (See Section VI, Paragraph 19 of Stipulated Facts.)

14. Deliveries of natural gas by Panhandle directly to industrial customers using large quantities of gas, and to other gas companies for resale to industrial customers using large quantities of gas, are, in most instances, subject to curtailment, interruption or discontinuance in the event of an insufficiency in the supply of gas.

15. The details of the service of natural gas to Anchor-Hocking since 1931, when it first commenced the extensive use of natural gas as a fuel at its plant at Winchester, Indiana, will be found in Section VI, Paragraph 21 of the Stipulated Facts and the supporting Exhibits mentioned therein, being "Exhibit G-6," "Exhibit K," "Exhibit L," and "Exhibit M," "Exhibit N-1," "Exhibit N-2" and "Exhibit N-3." Briefly summarized, from 1931 until May 11, 1942, Anchor-Hocking received this service from Indiana Gas; a public utility under the Indiana Act, which, in turn, purchased the gas from Panhandle or its predecessor, Michigan Gas, and this service was taken over by Panhandle under its contract dated May 11, 1942, copy of which is attached to the Stipulated Facts as "Exhibit N-2."

16. In the service of such natural gas directly to Anchor-Hocking, Panhandle transports the gas through a 6-inch lateral or branch gas transmission line ("Winchester line") extending north from Panhandle's main line a distance of about 7 miles, which Winchester line was constructed early in 1931. The pressure in the said main line, which is a 16-inch line running from a point near Muncie to a point in Ohio near the Indiana-Ohio State Line, is normally carried [fol. 168] at approximately 200 pounds per square inch. At or adjacent to a point where the natural gas is taken into the Winchester line from said 16-inch line, the pressure is reduced by means of a regulator, owned and operated by Panhandle, to approximately 100 pounds per square inch and the gas in the Winchester line is sold by Panhandle (1) to Anchor-Hocking for its own use and (2) to Indiana-Ohio Company for resale to consumers in Winchester, Portland and Union City in Indiana, and Union City, in Ohio, and their environs. Adjacent to the northeast corner of the

corporate limits of Winchester, Indiana, Panhandle has two-meter houses located approximately 400 feet apart, both of which are located on plant property of Anchor-Hocking. In one of these are the regulators and meters used in connection with deliveries to Anchor-Hocking and in the other, regulators and meters used in connection with deliveries to the Indiana-Ohio Company. A branch of the Winchester line runs directly into each of these meter houses and gas enters both at the same pressure, which is normally about 80 pounds per square inch. At the Anchor-Hocking meter house, the gas passes first through a regulator which reduces the pressure to approximately 40 pounds per square inch, then through two orifice meters into a header. From this header a four-inch service line carries the gas to the plant at the metering pressure (40 pounds per square inch). From this header gas also passes into another regulator in the meter house which reduces the gas to a pressure of approximately 10 pounds per square inch. From this regulator the gas at such pressure passes through a ten inch line directly into the glass plant. [fol. 169] Anchor-Hocking takes delivery of all gas at the outlet side of Panhandle's meter house. In 1943, Panhandle sold 1,150,279 M. C. F. of natural gas to Anchor-Hocking and 151,065 M. C. F. of natural gas to Indiana-Ohio Company. The Winchester line is located in part on certain public county highways in Randolph County pursuant to authority granted by the Board of Commissioners of said County to Ohio Fuel Gas Company, which built the line originally before it was acquired by Panhandle on February 6, 1942. (See Section VI, Paragraph 22, 23, 24, 25, 26 and 27 of the Stipulated Facts.)

17. Except as above shown, no franchise authorizing the sale or delivery of natural gas under the contract between Panhandle and Anchor-Hocking dated May 11, 1942, which is attached to the Stipulated Facts as "Exhibit N-1," has been acquired by Panhandle from the State of Indiana or any agency thereof, or is claimed by Panhandle to have been so acquired. (See Section VI, Paragraph 28 of the Stipulated Facts.) Panhandle has not filed with the Public Service Com-

mission of Indiana any tariffs of rates or any rules or regulations relating to the sale of natural gas to Anchor-Hocking; and Panhandle has at no time filed with the Public Service Commission of Indiana any annual report or any other periodic report, nor has it filed any original cost report appertaining to any portion of its property in Indiana. Panhandle has not purported to keep its books, accounts, papers or records in the manner required under the orders and directions of the Public Service Commission of Indiana for public utilities subject to the jurisdiction thereof. [fol. 170] In keeping its books, accounts, papers and records Panhandle is subject to the rules and regulations of the Federal Power Commission, but Panhandle claims that direct sales by it to industrial consumers are not subject to regulation by the Federal Power Commission. (See Section VI, Paragraphs 30, 31, 32, 33, and 34 of the Stipulated Facts.)

18. Each of the intervenors in this Cause has filed with the Public Service Commission of Indiana, sworn annual reports for the years 1942 and 1943, as provided for by the Public Service Commission Act of the State of Indiana.

19. After an exchange of letters between Panhandle and Kokomo Company in June 1943, the preliminary arrangements for such a meeting being made on June 30, 1943, certain representatives of Panhandle and of Kokomo Company had a meeting with Mr. Williams and Mr. Clifford of Continental Steel Corporation, one of the large industrial consumers being served by Kokomo Company with gas being purchased by it from Panhandle. In the course of this conference, Mr. Morton, one of the representatives of Panhandle, reiterated what he had already stated on the day previous to Mr. Hahn of Kokomo Company, namely, that it would be the purpose and intention of Panhandle in the future to make all contracts for supplying gas to large industrial consumers direct with such consumers and that Panhandle hoped to make such arrangements with the Continental Steel Corporation. (See Section 14 of the Stipulation of Evidence.)

20. On the afternoon of June 30, 1943, Messrs. Morton and Ballard, representing Panhandle also, called [fol. 171] on certain representatives of Service Company in connection with the matter of a supply of natural gas for the Ingersoll Steel and Disc Division of the Borg Warner Corporation (Ingersoll Company), a large industrial consumer at New Castle, Indiana, then being supplied by Service Company under an interruptible gas contract with gas obtained from Panhandle. Mr. Morton stated that the Federal Power Commission had previously ruled that direct sales of gas to consumers of pipe line companies were not subject to regulations by such Commission; that Panhandle desired to sell as much industrial load direct to industries as possible in order to remove this segment of its business from the jurisdiction of such Commission; that Panhandle proposed to sell direct to the industrial consumers at the points of inter-connection between the facilities of Panhandle and the existing distributing utilities whose facilities would be utilized to transmit the natural gas for the account of the industrial consumers; that present plans of Panhandle contemplated limiting the size of interruptible industrial consumers that Panhandle desired to serve direct to such consumers as had a monthly consumption of about 10,000,000 or more cubic feet of gas. On the following day, Messrs. Morton and Ballard of Panhandle again stated to representatives of the Ingersoll Company that Panhandle intended to serve natural gas direct to their plant, and likewise intended to serve direct all other large industrial consumers up and down the pipe line of Panhandle; and under date of July 19, 1943, Panhandle forwarded to Service Company for acceptance, an extension of the Ingersoll [fol. 172] Supply Contract which provided for termination by either party on 60 days written notice, and on July 29, 1943, Service Company accepted such extension agreement and on the following day entered into a supplemental agreement with the Ingersoll Company fixing a like termination period. This latter agreement was filed with and approved by the Public Service Commission of Indiana. (See Sections 15, 16 and 17 of the Stipulation of Evidence.)

21. (a) Early in 1941, Panhandle and Central Gas carried on certain negotiations with reference to the terms and provisions of a new gas supply contract and on or about July 31, 1941, both companies executed and delivered a new supply contract (See "Exhibit L" of the Stipulation of Evidence). Panhandle subsequently informed Central Gas that its Board of Directors refused to approve said contract although the signature clause indicated that the officers of Panhandle, who had signed the same in its behalf, acted with authority. This refusal of approval was based upon the fact that the contract, in effect, would prohibit Panhandle from undertaking direct service to industrial customers in the area being served by Central Gas. Numerous conferences were held between representatives of Panhandle and Central Gas with reference to this matter during the remainder of 1941 and prior to August 4, 1942, on which latter day Central Gas directed to the Federal Power Commission for filing under the Natural Gas Act, a Petition, which is included in the Stipulation of Evidence as "Exhibit K."

(b) Thereafter, while said Petition, "Exhibit K," [fol. 173] was pending, Panhandle filed with the Federal Power Commission its notice of cancellation or termination dated May 18, 1943, which is attached to the Stipulation of Evidence and included therein as "Exhibit L," and which was in the words and figures following, to-wit:

"Notice of Cancellation or Termination

Federal Power Commission

Washington, D. C.

Gentlemen:

"Notice is hereby given that the following identified rate schedules filed with the Federal Power Commission by Michigan Gas Transmission Corporation (now Panhandle Eastern Pipe Line Company) are proposed

to be cancelled on the dates respectively set forth apposite the description of each of said schedules:

[fol. 174]

PEPL Co. Rate Schedule RPC Number	Name of Ultimate Industrial Customer	Date of Contract	Date of Proposed Term's
76	Guide Lamp Division of Gen. Motors Corp.	9/12/40	7/19/43
72	Sterling Glass Co.	7/ 8/40	8/ 3/43
Supp. 15 to 71	Slick Glass Co.	2/16/40	7/19/43
74	Owens-Illinois Glass Co.	5/27/41	7/19/43
Supp. 17 to 71	Foster-Forbes Glass Co.	10/31/40	8/ 3/43
Supp. 6 to 71	Aladdin Industries	10/ 5/38	7/19/43
Supp. 7 to 71	Sneath Glass Co.	10/ 5/38	7/19/43
Supp. 14 to 71	Hart Glass Div. of Armstrong Cork Co.	11/13/39	7/19/43
Supp. 5 to 71	Indiana Glass Co.	9/27/38	7/19/43
Supp. 13 to 71	Ball Brothers	11/ 1/39	7/19/43
Supp. 16 to 71	Banner Rock Div. of Johns-Manville Corp.	8/20/40	7/19/43
Supp. 11 to 71	General Insulating Co.	10/20/38	7/19/43
29	Banner Rock Div. of Johns-Manville Corp.	5/ 5/41	7/19/43
28	Eaton Canning Co.	5/ 5/41	7/19/43

[fol. 175] "The aforementioned Michigan Gas Transmission Corporation rate schedules numbers 28 and 29 are so designated for the reason that Panhandle Eastern Pipe Line Company has not been advised that new Panhandle Eastern Pipe Line Company schedule numbers have been assigned thereto.

"The above notice was served on Central Indiana Gas Company by depositing a copy thereof in the United States mail, addressed to Central Indiana Gas Company at Muncie, Indiana, on the eighteenth day of May, 1943.

"No negotiations are presently in progress for a continuance of the service to the customers covered by the said rate schedules, however, it is the intention of Panhandle Eastern Pipe Line Company to negotiate with said several industrial customers for a continuation of the service directly by Panhandle Eastern Pipe Line Company. Also, it is the intention of Panhandle Eastern Pipe Line Company to negotiate with Central Indiana Gas Company for the purpose of effecting necessary arrangements for the delivery of gas by Central Indiana Gas Company to each of said customers for the account of Panhandle Eastern Pipe Line Company.

"Panhandle Eastern Pipe Line Company is not advised whether Central Indiana Gas Company approves

[fol. 176] or disapproves of the cancellation and termination of said several rate schedules.

Yours very truly, Panhandle Eastern Pipe Line Company, by C. Buddrus, President.

Dated this 18th day of May, 1943, at Kansas City, Missouri."

(c) Thereafter, on June 3, 1943, representatives of Central Gas conferred with the Chairman of the Board and President, respectively, of Panhandle with respect to Panhandle's official declaration of intention to render direct gas utility service, contained in the above Notice of Cancellation, and at that conference, the representatives of Panhandle stated that Panhandle was interested in serving directly certain industrial customers of Central Gas but on some basis which would make such direct sales by Panhandle outside of the jurisdiction of the Federal Power Commission under the Natural Gas Act; that Panhandle was anxious to take over such business because it was an unregulated transaction both as to the Federal Power Commission and the Public Service Commission of Indiana, and that it intended to establish higher industrial rates based on a competitive fuel basis. On or about June 11, 1943, at another conference between representatives of Panhandle and Central Gas, the representatives of Panhandle again stated, in sub-[fol. 177] stance, that Panhandle intended to take over direct service to certain of the large industrial customers of Central Gas and any negotiations would have to be with that eventuality in mind.

(d) On August 9, 1943, Central Gas addressed a letter to Federal Power Commission with reference to the Notice of Cancellation dated May 18, 1943, filed by Panhandle with that body which said letter contained, in part, the following:

"It is the declared policy and intention of Panhandle Eastern Pipeline Company to abandon service to Central Indiana Gas Company for resale to these industrial consumers, and to try to take over and serve directly these industrial consumers so that the rates to be charged therefor will be beyond the regulatory control of the Federal Power Commission.

Since it is patently impossible, as shown by the attached map, for Panhandle Eastern Pipeline Company now to serve these industrial consumers except by means of the facilities of Central Indiana Gas Company and since, as stated by Panhandle Eastern Pipeline Company in its notice of cancellation, it intends to continue service for these industrial consumers, we do not see that there is any alternative for Central Indiana Gas Company but to disapprove and oppose vigorously the proposed cancellation. It is clear that the present and future public convenience and necessity will not permit such proposed abandonment. Further, it is noteworthy that the underlying purpose of such proposed abandonment is to try to effect a technical or paper rearrangement [fol. 178] of this sale to Central Indiana Gas Company for resale to industrial consumers, so that it will have the appearance of a direct sale and hence be at rates not subject to the jurisdiction of the Federal Power Commission."

(e) Under date of September 1, 1943, Panhandle addressed a letter to the Federal Power Commission and sent a copy thereof to Central Gas, which was in the following words and figures, to-wit:

"September 1, 1943.

Federal Power Commission, Washington, D. C.

Attention: Leon M. Fuquay, Secretary

Re: Docket No. G-495

DEAR SIRs:

"This letter is with reference to the letter of Central Indiana Gas Company to you, dated August 9, 1943, protesting our notice of cancellation, dated May 18, 1943, of contracts with Central Indiana Gas Company for its gas requirements for resale to fourteen of its industrial customers.

"We have not concluded negotiations with certain other war industries, not presently served by us, which would require volumes of gas equal to those volumes required by Central Indiana Gas Company

to serve said fourteen industrial customers. Moreover, because of the shortage and the conservation of critical materials, we are unable at this time to [fol. 179] obtain the necessary facilities to render direct service to any of the industries named in our notice of cancellation.

"Without altering our policy to any extent whatsoever with respect to this matter, but for the reasons above stated, we hereby withdraw said notice of cancellation, dated May 18, 1943, as amended and extended by our letters to Federal Power Commission, dated June 14, 1943, and July 23, 1943; without prejudice to our right of again filing a similar notice of cancellation, which we intend to do, at such time as it may appear to us to be desirable.

Very truly yours, — — —, President.

cc: Central Indiana Gas Company"

(f) On October 22, 1943, Central Gas addressed a letter to the Federal Power Commission with reference to the same matter, which was in the words and figures following:

"October 22, 1943."

Federal Power Commission, Washington, D. C.

Attention: Office of the Secretary

DEAR SIRs:

"We have received, presumably from Panhandle Eastern Pipeline Company, an unsigned copy of letter dated September 1, 1943, addressed to the Federal Power Commission and referring to *Docket No. G-495*.

"That letter withdraws the notice of cancellation by [fol. 180] Panhandle Eastern Pipeline Company to the Federal Power Commission, dated May 18, 1943, as amended and extended, relating to certain rate schedules therein described for natural gas service to Central Indiana Gas Company for resale to industrial consumers. Since our letter to you dated August 9, 1943, disapproving and opposing the proposed cancellation was in the nature of a protest responsive to the notice of cancellation, we should like

to advise that in view of the withdrawal of that notice of cancellation, the Commission may consider that the purpose of our protest has been effectuated. Accordingly, we are pleased to have the Commission consider our protest as withdrawn. Since there appears a statement in the letter of withdrawal by Panhandle Eastern Pipeline Company that they intend at some future time to file again a similar notice of cancellation, our withdrawal is necessarily without prejudice to our rights of filing again a protest or taking any other action which may be necessary or desirable to assure compliance by Panhandle Eastern Pipeline Company with the requirements of the Natural Gas Act.

Very truly yours, Central Indiana Gas Company, by Guy T. Henry, President."

(See Sections 18, 19, 20, 21; 22, 23, 24, 25 and 26 of the Stipulation of Evidence and the supporting Exhibits referred to therein, respectively.)

[fol. 181] 22. A compilation taken from the annual reports of the gas public utilities operating in Indiana under the jurisdiction of the Public Service Commission for the year 1943 shows that the book cost of gas plant (undepreciated), exclusive of common property used in other branches of the utilities business, is in excess of \$85,000,000; that the total gas consumption in thousands of cubic feet was 48,356,978.5 and that the total gross revenues derived from such sales of gas amounted to \$26,301,204.14. It also showed that of the total consumption above mentioned in thousands of cubic feet, industrial sales amounted to \$30,323,524.8, or 62.71% of the total; and that of the gross revenues above mentioned, sales to industry produced \$10,078,079.84, or 38.32% of the total. It also showed that the total number of consumers was 451,934 of whom 432,748, or 95.75%, were domestic consumers, 17,010, or 3.76%, were commercial and 1,242, or .028%, were industrial consumers (See Public Counsellor's Exhibit No. 1).

23. Oscar W. Morton, a Rate Engineer of Panhandle, testified before the Federal Power Commission on February 26, 1945, substantially as follows: Panhandle

would not willingly sell and deliver gas at Fortville, Indiana, for resale to the Dupont plant because they want to make as much money as they can out of that business and they can make more money selling gas directly than by selling it to someone, who, in turn, resells it and thus brings the transaction under the jurisdiction of the Federal Power Commission. If any other industrial plants than Dupont show an interest in obtaining gas, they would want to serve them directly [fol. 182] rather than serve them through the local distributing companies. It is the declared policy of Panhandle to secure as much of the load as direct as possible (See Public's Exhibit No. 2 and the testimony of Mr. Morton copied therefrom).

24. The development of its gas business in anything like its present proportion by Service Company has taken place almost wholly since natural gas was brought into Indiana by Panhandle, as hereinabove recited. This fact is illustrated by Service Company's Exhibit No. 1, which shows that for the year ended December 31, 1935, it had a total of gas customers of 41,245; whereas, at the year ended November 30, 1944, it had a total of such customers of 58,929 and that its average gas revenue per therm from residential customers went from \$.2374 in 1935 to \$.1576 for the twelve months period ended November 30, 1944 (See Service Company's "Exhibit No. 1").

25. It also appeared from Service Company's Exhibits No. 2 and 3 that if Service Company were to lose all of the gas revenues classified as industrial sales by reason of the pipe line company's furnishing the same, taking over those customers for direct service, it would mean loss in gross revenue in excess of \$1,000,000 per annum based on figures for the twelve months period ending November 30, 1944, and for the same period, a loss in net operating income before provision for Federal Income Taxes of \$293,730.22. And it appeared from testimony of Mr. Schiesz that in the event of that contingency happening, Service Company would only [fol. 183] be able to dispense with less than 2% of its gas utility plant property. If Service Company's industrial load should be lost to it by reason of the industrial customers being taken over by Panhandle for

direct service, only about \$100,000. of Service Company's investment in plant property could be retired and all of the remainder of its investment now devoted to gas service must be maintained and operated to serve Service Company's domestic and commercial users and the rates charged for service to the latter must necessarily be substantially increased to justify continuing the service to them. (Service Company's Exhibit No. 1 and testimony of Mr. Schiesz, pages 67-70 of Transcript.)

26. The fact that the distributing companies served natural gas to all three classes of gas consumers, i. e., industrial, commercial and domestic, has made possible a high standard of service at lower rates to the consumers in each of the three classes than would have been possible if only one of the classes had been served. It has meant that the residential and commercial customers have had the benefit of natural gas which would have been denied them unless the distributing companies' business had included service to all three classes of consumers. The installation of facilities to serve industrial consumers has made possible the development of domestic uses, including cooking and water heating, the higher B. T. U. gas for house heating and the use of gas for commercial cooking purposes by restaurants, hotels and others. All of these services under old methods were prohibitive in cost or the gas was not available in the quantities in which the customers [fol. 184] wished to use it, due to the inadequacy of facilities and of the supply of gas. It was through the development by the distributing companies of the industrial business that they have been able to improve materially the over-all load factor of gas purchased. This has also enabled the distributing companies to spread their fixed costs, such as interest, taxes and depreciation, which are constant in every-day operation, over a larger number of units of service, which automatically has given the benefit of that condition and fact to each of the three classes of consumers and has made possible the development of rates for service which were attractive not only to one of the three classes but to each of them; all of which has had the effect of promoting greater public interest in the area

served by these distributing companies in the use of natural gas and in advancing the public welfare in those areas. (Pages 60, 61, 63, 75, 82 of Transcript.)

27. It appears from Central Gas' Exhibit No. 1 and the testimony with reference thereto of Guy T. Henry, its President (see pages 71 to 77, both inclusive, of the Transcript) that for the calendar year ended December 31, 1944, the total gross revenues from sales of gas of Central Gas amounted to \$4,076,369.11; that its sale to industrial users grossed \$2,677,265.74; that for the same period its net operating income, before provision for Federal Income Taxes, amounted to \$683,393.58; that if Central Gas should lose all of its industrial customers by reason of their being taken over by Panhandle for direct service, it would have resulted in a loss in net revenues of \$514,206.67 (see Central Gas' "Exhibit No. 1" and the supporting schedules); that [fol. 185] if Panhandle were to take over all of the industrial customers of Central Gas for direct service, Central Gas would be able to retire only about 1% or 2% of its investment in plant property and would find it necessary to maintain and continue to use all of the remainder of its plant property in continuing to furnish service to its domestic and commercial customers; that Central Gas has approximately 26 industrial customers, each of which use in excess of twenty-five million cubic feet of gas per year, and which, in the aggregate, use approximately nine billion feet of gas per year and from which Central Gas obtains gross revenues of approximately two and one-half million dollars; that the 14 customers mentioned in Exhibit L to the Stipulation of Facts, being the Notice of Cancellation filed by Panhandle with the Federal Power Commission under date of May 18, 1943, were among such 26 industrial customers using approximately 90% of all of the gas sold by Central Gas to industrial customers; and that if Panhandle should take over this industrial business of Central Gas and serve the customers directly, it would certainly result in a substantial increase in the present rates of Central Gas to its domestic and commercial customers in order to enable it to continue to carry on its business and to pay a return on its investment.

28. It appears from Kokomo Company's Exhibit No. 1 and the testimony of its President and General Manager, Mr. Hahn, with reference thereto, that for the 12 months period ending December 31, 1944, its total gross revenues amounted to \$485,170.41, of which [fol. 186] \$198,630.79 was "derived from industrial sales; that if these industrial sales had been eliminated that year, it would have resulted in a reduction in net operating income, before provision for Federal Income Taxes, from \$128,157.86 to \$21,755.78, a total loss of \$106,402.08; that if the industrial business of Kokomo Company were taken over and served directly by Panhandle the amount of plant property which Kokomo Company would be able to retire would be so slight as to be almost negligible, a matter of four or five thousand dollars; and that it would further result in a considerable revision of its present rates for domestic and commercial customers. (See Kokomo Company's "Exhibit No. 1" and "Exhibit No. 2" and the testimony with reference thereto of Mr. Hahn appearing on pages 78 to 90, both inclusive, of the Transcript.)

29. The use to which Panhandle is placing its facilities in Indiana and plans to place them in the future is shown by the following:

a. Panhandle has declared to Kokomo Company that "Panhandle desired, and was planning in the future, to make all industrial gas supply contracts" to large industrial users "direct with the industrial consumers; that some arrangement would have to be worked out whereby the interest of Kokomo Company in such gas sales would be continued, but the ultimate consumer would no longer be a customer of Kokomo Company, but would be a customer of Panhandle; that if Panhandle sold direct to Continental Steel Corporation, the sale would not come under the jurisdiction of the Federal Power Commission; [fol. 187] and that such was the chief objective of Panhandle in making such contract direct with the industrial consumers." (Stipulation of Evidence, Section 14.)

b. Panhandle solicited certain large industrial consumers of Service Company and stated to Service

Company "that the Federal Power Commission had previously ruled that direct sales of gas to consumers of pipeline companies were not subject to regulation by such commission; that Panhandle desired to sell as much industrial load direct to industries as possible in order to remove this segment of its business from the jurisdiction of such commission; that Panhandle proposed to sell direct to industrial consumers at the points of inter-connection between the facilities of Panhandle and the present distributing utilities, that the facilities of the present distributing utilities would be utilized to transmit the natural gas for the account of the industrial consumers, who would reimburse the distributing utilities in an amount approximating the 20% of the rate being received by them on the sale of the interruptible natural gas; that present plans of Panhandle contemplated limiting the size of interruptible industrial consumers that Panhandle desired to serve direct to such consumers as had a monthly consumption of about 10,000,000 or more cubic feet of gas; and that he (Panhandle's representative) had been directed by Panhandle to outline the plan to the separate industrial consumers now served with interruptible gas by Service Company." Panhandle declared to Service Company [fol. 188] and certain of its industrial customers that Panhandle "intended to serve directly other large industrial gas consumers up and down the pipe line of Panhandle." (Stipulation of Evidence, Sections 15 and 16.)

c. Panhandle refused to make any contract with Central Gas for a supply of natural gas unless it "was based upon the policy that Panhandle should undertake at some time or other to serve directly some or all of these industrial consumers which are now being served by Central Indiana with natural gas purchased by Central Indiana Gas from Panhandle." (Stipulation of Evidence, Section 20); and Panhandle declared this policy in 1942 was the policy of the Board of Directors of Panhandle and that "its policy underlying that position, is to take over and serve directly such industrial customers

which it refuses to serve through Central Gas." (Stipulation of Evidence, Section 21.)

d. The Chairman of the Board and the President of Panhandle both stated "that Panhandle was interested in securing directly certain industrial customers of Central Gas, but on some basis which would make such direct service by Panhandle outside the jurisdiction of the Federal Power Commission under the Natural Gas Act. Said Mr. W. G. McGuire (Chairman of the Board of Panhandle) stated at such conference that Panhandle was anxious to take over such business (direct sales to industrial customers) because it was an unregulated transaction both as to the Federal Power Commission and the Public Service Commission of Indiana [fol. 189] and that he intended to establish industrial rates on a competitive fuel basis." Said representative of Panhandle stated that "Panhandle intended to take over direct service to certain large industrial consumers of Central Gas and any negotiations would have to be with that eventuality in mind." (Stipulation of Evidence, Section 23.)

e. Panhandle seeks to sell directly any industrial plant using natural gas in quantities agreeable to Panhandle and not to sell the gas to a distributing company for resale; and declares "it is our policy to serve as much of the load as direct as possible" and that "it is their policy to obtain any place on or adjacent to their system as much direct industrial gas as they can," because Panhandle contends such business is beyond regulation by any regulatory body or agency, thus enabling Panhandle to make as much money as possible from the business. (Transcript of Cross-Examination of Oscar W. Morton, Rate Engineer for Panhandle, before Federal Power Commission on February 26, 1945, as shown at pages 44 to 46, inclusive, of Transcript of Proceedings.)

[fol. 190]

OPINION AND CONCLUSIONS

This investigation presents the basic problem of whether or not this Commission has *any* regulatory jurisdiction over direct sales of natural gas to Indiana consumers.

when such sales are made, under the circumstances shown in this record, by the company transporting the gas into the state from outside sources. No issue is here raised as to regulation of the transportation of gas into or through the state, or of the sale of such gas in the state to other public utilities for resale for ultimate public consumption for domestic, commercial, industrial or any other use. Regulatory control of such matters has been specifically committed to the Federal Power Commission by Section 1 (b) of the Natural Gas Act.

Nor is any issue presently involved as to any specific regulatory action by the Commission over the rates or service of Panhandle in Indiana in the case of sales direct to Indiana consumers other than the requiring of the filing of tariffs and reports. The fundamental question is whether the direct consumer sales of Panhandle are subject to regulation by this Commission in any respect. If so, it is clear, and the Commission does not understand that counsel for Panhandle dispute, that the tariffs of rates, rules and regulations for such service by Panhandle should be on file with the Bureau of Tariffs of the Commission and that annual reports of Panhandle should have been filed with the Commission.

[fol. 191] The facts establish, among other things, that indirectly, i.e. by sales for resale, Panhandle supplies gas generally for industrial use. Panhandle also, either from its ~~main or~~ branch lines, supplies gas directly to more than a score of consumers for industrial use, and is and has been active in seeking and securing where possible such consumers making direct purchases. The facts show its admitted intention of rendering direct service wherever large industrial customers can be obtained.

At the present time, Panhandle has direct service in Indiana to Anchor-Hocking. This direct service was commenced by Panhandle in 1942 by its taking over service to such customer from Indiana Gas, then an Indiana subsidiary of Panhandle, before Panhandle disposed of its full stock ownership in Indiana Gas.

The physical set-up under which this direct consumer sale is made should perhaps be briefly summarized here, since counsel for Panhandle rely heavily on this in asserting escape from the jurisdiction of the state.

The facts show that Panhandle brings gas into and through Indiana by means of high pressure transmission

lines. The pressure in these lines vary from 250 to 600 pounds. From these main lines, extend branch or lateral lines, generally smaller in size than the main lines, and carrying gas at lower pressures than in the main line. One of these branch lines is the "Winchester line" by means of which gas is transported from a main line north (at pressures from 100 to 80 pounds per square inch) both for delivery to Anchor-Hocking and for delivery, to [fol. 192] Indiana-Ohio Company for resale. The Winchester line was constructed in 1931, but until November 1934, when the sale of natural gas to Indiana-Ohio Company was commenced, the line was used wholly for the purpose of transporting gas sold to Indiana Gas for resale to Anchor-Hocking. Near the end of the Winchester line, that line, as presently constructed, branches, one branch leading to the meter house at the outlet side of which deliveries are made to Indiana-Ohio Company, and the other leading to the meter house at the outlet side of which deliveries are made to Anchor-Hocking. In the meter houses, among other things, pressures are reduced to those at which delivery is desired, which in the case of Anchor-Hocking is in part at 40 pounds per square inch and in part at 10 pounds per square inch. Deliveries to Indiana-Ohio Company are at pressures ranging from 25 to 9 pounds per square inch depending upon the season of the year. In both cases, all the facilities (other than the real estate) up to the pipe at the outlet side of the meter house are owned and operated by Panhandle.

These physical facts are here outlined, not because the Commission deems them of any controlling importance in the decision of this cause, but because counsel for Panhandle have stressed them in their briefs and oral argument as physical factors establishing that the supply to Anchor-Hocking is in interstate commerce, which fact they argue precludes regulatory jurisdiction by the state. For reasons to be hereafter discussed, this commission believes [fol. 193] that such views of counsel are untenable and based upon a misconception of controlling principles.

Counsel for Panhandle frankly conceded in their oral argument that unless Panhandle is immune from regulatory control of the State of Indiana because of the restrictions of the commerce clause of the federal constitution, it is subject to the regulation of this state as a public utility operating within the state. They strenuously urge, however, that

interstate commerce provides Panhandle immunity from regulation until Congress acts. They assert that the Natural Gas Act shows a policy on the part of Congress to have direct consumer sales of natural gas unregulated if made in interstate commerce; and that, regardless of congressional intent, the direct industrial sales of Panhandle, as interstate commerce, are beyond the pale of any regulation by this Commission because of prohibitions imposed by the interstate commerce clause of the federal constitution.

The Commission believes there can be no question but that Panhandle's operations in Indiana are subject to its jurisdiction except to such extent as constitutional limitations or federal regulation prohibit such jurisdiction. The record here makes it indisputably clear that the business of Panhandle is that of furnishing, directly and indirectly, natural gas to and for the public. In such activity, and the devotion of its facilities thereto, it is a public utility both within the general sense of that term and within the specific [fol. 194] definition thereof in the Public Service Commission Act. As a public utility its rates and service are subject to governmental regulation. The question is only to what ~~extent~~ regulation by Indiana under its act may be applied in view of the interstate movement of the gas that finally reaches the consumer; and this investigation is limited to the situation only of supplying direct to consumers.

In their briefs, counsel for Panhandle asserted that no certificate of convenience and necessity was or could be required of Panhandle in respect of its direct consumer sales because of their interstate character. From this assumption they argued that this fact showed immunity from regulation under the state act. The Commission is not here required to pass upon the assumption made that a certificate can not be required by the State, for the reason that, because of the time the Anchor-Hocking service was commenced, there are no provisions of the Indiana statute which require any certificate as a condition precedent for the service. The existence of a certificate of necessity and convenience or any other franchise grant is not, however, the basis of regulatory control of public utility service by this Commission under the Public Service Commission Act. That act was passed to safeguard the public interest in respect of public utility service. It has been specifically construed by the Supreme Court of Indiana to have such broad purpose and scope, and to be not limited to regulation of utilities to

whom certificates of public convenience and necessity have [fol. 195] been granted. *City of Logansport v. Public Service Commission*, 202 Ind. 523, 177 N. E. 249 (1931).

The Commission has concluded, after its consideration of this case, that neither counsel's position as to congressional policy nor their position as to the restrictive scope of the commerce clause of the federal constitution are tenable. The reason upon which these conclusions are based will be briefly discussed.

a. The Natural Gas Act and Congressional Policy

The bill for federal regulation of natural gas transportation and sale, which was the basic pattern of the final Natural Gas Act, was introduced in Congress in 1936. It was the subject of extensive public hearings in 1936 and 1937 held by committees of the House of Representatives. (Report of Hearing by House of Representatives' Subcommittee of Committee on Interstate and Foreign Commerce held April 2, 3, 7, 14 and 15, 1936; Report of Hearing by House of Representatives' Committee on Interstate and Foreign Commerce held March 24-25, 1937). The bill as originally introduced contained jurisdictional provisions (Section 1 (b)) which were from the start of the hearings the subject of much debate as to the federal jurisdiction provided for. Under the original provision "high-pressure" and "low-pressure" mains were jurisdictional determinatives. The specific provision was:

"(b) The provisions of this Act shall apply to the transportation of natural gas in high-pressure mains [fol. 196] in interstate commerce and to natural-gas companies engaged in such transportation, but shall not apply to the distribution of natural gas moving locally in low-pressure mains or to facilities used for such distribution or to the production of natural gas: *Provided*, That nothing in this Act shall be construed to authorize the Commission to fix rates or charges for the sale of natural gas distributed locally in low-pressure mains or for the sale of natural gas for industrial use only."

Prior to the reporting out of the Bill by the Committee, Section 1 (b) underwent several changes. That section as

sent to the House by the Committee, and as contained in the Natural Gas Act as passed, provides:

"(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

At the initial hearings, Mr. A. R. McDonald, Wisconsin Commissioner, Chairman of the Committee on Legislation of the National Association of Railroad and Utility Commissioners, presented a resolution of the association asking Congress to limit the federal rate regulation to the sale of [fol. 197] natural gas for resale. In this connection he pointed out that the pipe line companies were presently wholly unregulated only so far as they did not sell to the consumer but only to distributing companies, and asked that state regulation be not invaded by the legislation.

John E. Benton, Esquire, General Solicitor for the association, in discussing the association's resolution and proposed amendments, said that they were designed to make it clear that the Federal Act did not take from the states the regulation of rates on sales made direct to industrial customers. He said that the request of the association was

"based upon the fact that the United States Supreme Court has recognized that the distribution of gas locally to consumers either for domestic or industrial use, is a local business, and may be reached, controlled and regulated by local authorities, municipalities and states, as provided by state law, so long as Congress withholds its hand from regulation. The states can now regulate those rates to consumers until Congress enters that field and crowds the states out."

Mr. Benton further said, after a discussion of the authorities:

"It was evidently the purpose of the one who drew the act to reserve to the State authorities the right to

regulate the consumer rate, even though the consumer was an industrial user who received his supply in a high pressure main.”;

and stated that his amendment was to make it clear that [fol. 198] the proposed federal act did not apply to any consumer receiving gas for his own consumption “in either industrial or domestic use.”

The issue of whether or not sales of gas for industrial use should be and were subject to governmental regulation was specifically brought to the fore during the hearings. The subsequent action of the House Committee leaves no room for real doubt that there existed a congressional intent that industrial sales should all be subject to governmental regulation, either state or federal.

At the 1937 hearings Mr. William A. Dougherty, a New York attorney connected with three of the largest pipeline companies and with other gas companies, proposed certain amendments to the Bill. The first of these was one which, he explained, was for the purpose of making it clear that no sales, direct or indirect, for industrial purposes were within the provisions of the legislation. Following this presentation, Mr. Benton asked, and was granted, leave to present written comments upon the suggested amendments. In opposing Mr. Dougherty's first suggestion and submitting his own proposed amendment for clarification of the matter, Mr. Benton, among other things, stated (Report of Hearings on March 24-25, 1937, p. 143):

“In this connection I point out that the exemption of industrial gas, as I understand your bill, is not for the purpose of exempting industrial gas from all regulation, but for the purpose of avoiding any possible [fol. 199] claim that because some industrial user may be taking a very large quantity of gas, service to him, on account of its wholesale character, should be considered subject to regulation by the Federal Commission.

“Service to an industrial user is just as much a local service, and within State jurisdiction to regulate until Congress acts, as is a sale to a householder for domestic use. Until Congress occupies the field, a sale for industrial use is accordingly subject to state regulation under the rule laid down in *Pennsylvania Gas Company v. New York Public Service Commission*, above cited.

"Sales for industrial use ought not to be exempt from all regulation, for the result may very well be that unjustifiable discrimination will result, and there will be no commission to which complaint may be made. Sales for industrial uses plainly ought to be subject to regulation by the same Commission which regulates sales to other classes of consumers, so that just and reasonable rates, for the several classes of service, properly related to each other, may be established. Under the bill as drawn, all consumer sales are exempt from Federal regulation and left to State regulation. The language of the suggested amendment just proposed leaves this purpose unaffected, and makes clear that the regulation of inter-company sales is designed for the protection of the consuming public, as a part of the complete regulation of the entire utility service."

In its initial report on the Natural Gas Act, made on May 13, 1936 (74th Cong., 2d Sess., Rep. No. 2651), the Committee [fol. 200] pointed out that the Bill exempted from the jurisdiction of the federal commission the sale of natural gas for industrial use, the states not being deprived by the federal act of any lawful authority over the distribution and sale of natural gas locally.

In the discussion of the general purposes of the proposed act, the report states:

"The main purpose of the bill is to provide for the regulation of the transportation and sale of natural gas in those cases in which the state regulatory bodies do not have jurisdiction. . . .

"Under the decisions of the United States Supreme Court rates charged in interstate wholesale transactions may not be regulated by the states. Such transactions are defined in the bill to mean sales of natural gas for resale. The Commission is given no jurisdiction over local rates even where the natural gas moves in interstate commerce. . . .

"The bill takes no authority from State Commissions and is so drawn as to be a complement, and is in no sense a usurpation, of State regulatory authority . . . Mr. A. B. McDonald, chairman of the Committee on Legislation of the National Association of Railroad and Utility Commissioners, and Mr. John E. Benton, general solicitor of the National Association of

Railroad and Utility Commissioners, appeared at the hearing before the sub-committee in support of the bill."

In its final report (75th Cong., 1st Sess., Report No. 709), made on April 28, 1937, which report was adopted by the [fol. 201] Senate Committee together with a recommendation that the Natural Gas Act be passed, the Committee stated:

"This bill is substantially identical with H. R. 12680 which, as amended, was reported by the Committee on Interstate and Foreign Commerce of the Seventy-fourth Congress, second session, with a recommendation that it pass. If enacted, the present bill would for the first time provide for the regulation of natural-gas companies transporting and selling gas in interstate commerce. It confers jurisdiction on the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Company v. Public Service Commission* (1920), 252 U. S. 23). There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence [fol. 202] of Congressional action, not subject to State regulation. (See *Missouri v. Kansas Gas Company*, (1924) 265 U. S. 298, and *Public Service Commission v. Attleboro Steam & Electric Company*, (1927), 273 U. S. 83). The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

The report then refers to the fact that the regulation provided "takes no authority from state Commissions" but "complements" state regulatory authority, and that the states and the state commissioners' association favored the passage of the Natural Gas Act; and refers to the resolution filed by the association and the letter filed by John E. Benton, Esquire, its general counsel.

The report continues:

"Your commission believes that this legislation is highly desirable to fill the gap in regulation that now exists by reason of the lack of authority of the State Commissions."

Following the hearings the Bill, before being reported out by the Committee, was further revised to its enacted form and clearly gives the federal commission full rate and service regulatory jurisdiction over all gas sold for resale regardless of the purpose for which such gas is to be used by the consumer. The revised Bill continued the basic principle of non-interference with state regulatory jurisdiction in all direct consumer sales.

In cases arising under the Natural Gas Act the Supreme Court of the United States has had occasion to review the [fol. 203] legislative history of the statute and to point out the complementary nature thereof.

In *Public Utility Commission of Ohio v. United Fuel Gas Company*, 317 U. S. 456, 87 L. ed. 396 (1942), the court said, pp. 402-3:

"It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong., 2d Sess., pp. 1-3; H. Rep. No. 709, 75th Cong., 1st Sess., pp. 1-4; Sen. Rep. No. 1162, 75th Cong., 1st Sess."

And in *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 88 L. ed. 333 (1944), the court, through Mr. Justice Douglas, stated, p. 349:

"We pointed out in *Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, 314 U. S. 498, 506, 86 L. ed. 371, 376, 62 S. Ct. 384, that the purpose of the Natural Gas Act was to provide, 'through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving inter-[fol. 204] state, which this Court had declared to be interstate commerce not subject to certain types of state regulation.' As stated in the House Report the 'basic purpose' of this legislation was 'to occupy' the field in which such cases as *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298, 68 L. ed. 1027, 44 S. Ct. 544, and *Public Utilities Commission v. Atleboro Steam & Electric Co.*, 273 U. S. 85, 71 L. ed. 549, 47 S. Ct. 294, had held the States might not act. H. Rep. No. 709, 75th Cong., 1st Sess., p. 2. In accomplishing that purpose the bill was designed to take 'no authority from State commissions' and was 'so drawn as to complement and in no manner usurp State regulatory authority.' Id. p. 2. And the Federal Power Commission was given no authority over the 'production or gathering of natural gas.' § 1 (b).

"The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. Due to the hiatus in regulation which resulted from the *Kansas Natural Gas Co.* Case and related decisions state commissions found it difficult or impossible to discover what it cost interstate pipeline companies to deliver gas within the consuming states; and thus they were thwarted in local regulation. H. Rep. No. 709, supra, p. 3. Moreover, the investigations of the Federal Trade Commission had disclosed that the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies. State commissions, independent producers, and communities having or seeking the service [fol. 205] were growing quite helpless against these

combinations. These were the types of problems with which those participating in the hearings were pre-occupied. Congress addressed itself to those specific evils."

And in his concurring-opinion, Mr. Justice Jackson, referring to judicial determination of regulatory power, states, p. 370:

"Then came issues as to state power to regulate as affected by the commerce clause. *Public Utilities Commission v. Landon*, 249 U. S. 236, 63 L. ed. 577, 39 S. Ct. 268, PUR 1919C 834 (1919); *Pennsylvania Gas Co. v. Public Serv. Commission*, 252 U. S. 23, 64 L. ed. 434, 40 S. Ct. 279, PUR 1920E 18 (1920). These questions settled, the Court again was called upon in natural gas cases to consider state rate making claimed to be invalid under the Fourteenth Amendment."

It seems to this Commission it would be patently absurd to conclude that Congress in the Natural Gas Act, which regulated service and rates in cases of natural gas sold to a distributing utility for resale to industrial consumers, announced a policy that there was such a lacking of public interest in direct sales to industrial consumers that such sales should be free from regulatory control by any governmental agency. Again and again in the legislative history is the plain assertion that the existing regulatory gap was to be filled, and that it was to be filled without encroachment on state functioning. To torture that clear purpose [fol. 206] into an intention that a large segment of the distribution of gas was to be uncontrolled, if the device of direct consumer sales by pipe-line companies was resorted to, would be to disregard an intent that Congress has plainly shown, and to ignore applicable principles to the end that competition in public utility service, discrimination in such service, and rates for such service to a class of users shall be uncontrolled and that the ability of the state to protect the interests of such class and the other classes of gas users would be inescapably impaired. This Commission finds no basis in the federal constitution or in the history of the legislation or in the decisions of the Supreme Court of the United States for such a conclusion as has been urged. It finds in that history, and in the decisions of that court,

and in the necessities of public interest, impelling reason to reject such contention. It finds in that history a clear showing that Congress recognized that all public utility sales of natural gas should be subject to regulation, and that by the Natural Gas Act it provided regulation within the full field in which, under the federal constitution, the states were powerless to act, but carefully preserved to the states full rate and service regulatory control in all other cases.

b. Commerce Clause of Federal Constitution, if Applicable,
Would Not Prohibit State Regulation

But counsel insist that, regardless of any congressional view that may be shown by the Natural Gas Act, constitutional prohibitions preclude state regulation of the sales [fol. 207] direct to Anchor-Hocking because the sales are in interstate commerce. Much argument can be expended, pro and con, on the question whether or not the sales of gas made direct to an industrial consumer under the factual circumstances shown in this case are sales in intrastate commerce or in interstate commerce. If the answer be sought wholly or primarily in physical characteristics, and logical consistency in the application of these physical characteristics is attempted, difficulties are soon encountered in the attempt to fix the line of demarcation. After careful study of the court decisions, this Commission is of the view that there is much in the opinions of the United States Supreme Court in *Missouri ex rel. Barrett v. Kansas Natural Gas Company*, 265 U. S. 298, 68 L. ed. 1027 (1924), *East Ohio Gas Company v. Tax Commission of Ohio*, 283 U. S. 465, 75 L. ed. 1171 (1931), and *Southern Natural Gas Corporation v. Alabama*, 301 U. S. 148, 81 L. ed. 970 (1937), and in its most recent opinion on this subject, *Connecticut Light & Power Company v. Federal Power Commission*, 323 U. S. —, 89 L. ed. Adv. Op. 691 (1945), to sustain the view that the direct industrial sales made by Panhandle, in the manner and under the circumstances shown by this record, are sales in intrastate commerce rather than sales in interstate commerce. See, also, the note by Professor Thomas Reed Powell on this subject in 58 Harvard Law Review 1072 (September 1945) for a careful analysis and illuminating discussion of this problem. The lower court decisions on which counsel for Panhandle rely on this point

[fol. 208] seem to this Commission to have overlooked the basic principles as set forth and discussed by the Supreme Court of the United States in the cases above cited. Nor does this Commission think that the recent natural gas cases decided by that court (*Colorado Interstate Gas Company v. Federal Power Commission*, 89 L. ed. Adv. Op. 807; *Colorado-Wyoming Gas Company v. Federal Power Commission*, 89 L. ed. Adv. Op. 831; and *Detroit et al. v. Panhandle Eastern Pipe Line Company*, 89 L. ed. Adv. Op. 836) can be deemed to represent either a reversal of those principles or a determination of the character of direct sales made in the manner shown by this record. Assuming the correctness of counsel's view that the court did characterize the industrial sales referred to in those cases as interstate ones, it is apparent from the issues and opinion that no problem of the exact character of the direct industrial sales was at issue since, be they interstate or intrastate, such sales were by the express provisions of the Natural Gas Act outside the jurisdiction of the Federal Power Commission. There is nothing in the opinions to indicate that the court had presented to it, or gave any consideration to, the factual characteristics attendant to those sales or tested them on the basis of its prior decisions pertinent to this point or considered them in the light of principles shortly thereafter announced in the *Connecticut* case.

This Commission is, of course, hesitant to decide controverted legal points when such decisions can be avoided, [fol. 209] although it will not shirk such duty when necessary as a basis for determining the duties placed upon it by the legislature. Fortunately, the issues of this investigation do not turn upon the interstate or intrastate character of the sales direct to the consumer. Whether those sales be interstate or intrastate, this Commission believes it has a regulatory control thereof. In the judgment of this Commission such sales, even if deemed interstate, are subject to state regulation because the matter is one within that class where a predominate local interest admits of reasonable, non-discriminatory regulation or exercise of police power by the state until and unless Congress sees fit to assert its superior right of control.

This principle was early announced by the Supreme Court of the United States, and has been often restated and applied by it.

In the early case of *Wilson v. Blackbird Creek Marsh Co.*, 2 Peters 245, 7 L. ed. 412 (1829); the Supreme Court of the United States upheld an act of Delaware authorizing the construction of a dam across a navigable stream. Mr. Chief Justice Marshall stated, p. 414:

"The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several States.'

"If Congress had passed any Act which bore upon the case; any Act in execution of the power to regulate commerce, the object of which was to control State [fol. 210] legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, we should feel not much difficulty in saying that a State law coming in conflict with such Act would be void. But Congress has passed no such Act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question.

"We do not think that the Act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

And in *Cooley v. Board of Wardens*, 12 Howard 299, 13 L. ed. 996 (1851), that court in upholding pilotage regulations by Pennsylvania said, pp. 1004-5:

"... we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress, did *per se* deprive the States of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the [fol. 211] States from exercising an authority over its

subject matter. If they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulations. *Sturges v. Crowninshield*, 4 Wheat. 193; *Moore v. Houston*, 5 Wheat. 1; *Wilson v. Black Bird Creek Marsh Co.*, 2 Peters 251.

"The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But [fol. 212] when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively de-

manding that diversity, which alone can meet the local necessities of navigation.

“Either absolutely to affirm, or deny, that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The Act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States [fol. 213] should deem applicable to the local peculiarities of the ports within their limits.”

In the case of *Simpson v. Shepard* (*Minnesota Rate Cases*), 230 U. S. 352, 57 L. ed. 1511 (1913), Mr. Justice Hughes, after a detailed discussion of the principles involved and the limitations on state authority, thus summarized the rule governing the regulatory power of the states as to interstate commerce, pp. 1542-3:

“But within these limitations there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regula-

tion should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. . . . Our system of government is a practical adjustment by which the national authority, as conferred by the Constitution, is maintained in its full scope, without unnecessary loss of [fol. 214] local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

In *Port Richmond etc. Ferry Company v. Board of Chosen Freeholders*, 234 U. S. 317, 58 L. ed. 1330 (1914), a case specifically upholding state regulation of rates for ferriage between two states, the basic principle was thus stated by Mr. Justice Hughes, pp. 1335-6:

"Coming, then, to the question now presented,—whether a state may fix reasonable rates for ferriage from its shore to the shore of another state,—regard must be had to the basic principle involved. That principle is, as repeatedly declared, that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive; that, in other matters, admitting of diversity of treatment according to the special re-[fol. 215] quirements of local conditions, the states may act within their respective jurisdictions until Congress

sees fit to act; and that, when Congress does act, the exercise of its authority overrides all conflicting state legislation. * * * It is this principle that is applied in holding that a state may not impose direct burdens upon interstate commerce, for this is to say that the states may not directly regulate or restrain that which, from its nature, should be under the control of the one authority, and be free from restriction save as it is governed by valid Federal rule. * * *

* * * The present question is simply one of reasonable charges. It is argued that the mere fact that interstate transportation is involved is sufficient to defeat the local regulation of rates, because, it is said, that it amounts to a regulation of interstate commerce. But this would not be deemed a sufficient ground for invalidating the local action without considering the nature of the regulation and the special subject to which it relates. * * * The fundamental test, to which we have referred, must be applied; and the question is whether, with regard to rates, there is any inherent necessity for a single regulatory power over these numerous ferries across boundary streams; whether, in view of the character of the subject and the variety of regulation required, it is one which demands the exclusion of local authority. Upon this question we can entertain no doubt. It is true that in the case of a given ferry between two states there might be a difference in the charge for ferriage from one side, as compared with that for ferriage from the other. But [fol. 216] this does not alter the aspect of the subject. The question is still one with respect to a ferry, which necessarily implies transportation for a short distance, almost invariably between two points only, and unrelated to other transportation. It thus presents a situation essentially local, requiring regulation according to local conditions. It has never been supposed that because of the absence of Federal action the public interest was unprotected from extortion, and that in order to secure reasonable charges in a myriad of such different local instances, exhibiting an endless variety of circumstance, it would be necessary for Congress to act directly, or to establish for that purpose a Federal agency. The matter is illuminated by the consideration of this alternative, for the point of the con-

tention is that, there being no Federal regulation, the ferry rates are to be deemed free from all control. The practical advantages of having the matter dealt with by the states are obvious, and are illustrated by the practice of one hundred and twenty-five years. And in view of the character of the subject, we find no sound objection to its continuance. If Congress at any time undertakes to regulate such rates, its action will, of course, control."

And in 1920 this same basic principle was specifically held by the court to be applicable to regulation of rates for gas moving in interstate commerce and sold direct to consumers. *Pennsylvania Gas Company v. Public Service Commission*, 252 U. S. 23, 64 L. ed. 434 (1920), *supra*. In that case, the court, upholding state regulation concluded, p. 443:

[fol. 217] "The thing which the state Commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the state of New York. . . .

"This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the states, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest, and has not been attempted under the superior authority of Congress."

It is interesting to note that, although in *East Ohio Gas Company v. Tax Commission of Ohio*, 283 U. S. 465, 75 L. ed. 1171, *supra*, the court disapproved the ruling of the *Pennsylvania* case that the sales direct to consumers were interstate sales, it carefully stated that the opinion in the *Pennsylvania* case was disapproved only "to the extent that it was in conflict" with the *East Ohio Gas* case decision holding the sales there involved to be intrastate in character.

In *Missouri v. Kansas Natural Gas Company*, 265 U. S. 298, 68 L. ed. 1027 (1924), the court, in denying state power to regulate sales of gas made for resale in interstate com-

merce and asserting such ruling was not inconsistent with its view in the *Pennsylvania* case and other decisions said, p. 1030:

[fol. 218] "There is nothing in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, 64 L. ed. 434, P.U.R. 1920E, 18, 40 Sup. Ct. Rep. 279, inconsistent with this view. There the Gas Company, a Pennsylvania corporation, transmitted gas from Pennsylvania into New York, and sold it directly to the consumers. The service to the consumers, which was the thing for which the regulated charge was made, was essentially local, and the decision rests upon this feature. * * *

The commodity, after reaching the point of distribution in New York, was subdivided and sold at retail. The Landon Case, so far as this phase is concerned, differs only in the fact that the process of division and sale to consumers was carried on, not by the Supply Company, but by independent distributing companies.

"In both cases the things done were local, and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the Landon Case. The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state, and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance."

In *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 86 L. ed. 754 (1942), the subject of state power where interstate commerce is involved was discussed by Mr. [fol. 219] Justice Reed, who, citing many authorities, summarized as follows, pp. 762-3:

"It has long been recognized that in those fields of commerce where national uniformity is not essential, either the state or federal government may act. *Willson v. Black Bird Creek Marsh Co.* 2 Pet (US) 245, 7 L ed 412; *California v. Thompson*, 313 US 109, 114, 85 L ed 1219, 1221, 61 S Ct 930. Where this power to

legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. But where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application.

"When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation."

In *Parker v. Brown*, 317 U. S. 341, 87 L. ed. 315 (1943); the court in upholding California regulatory legislation, thus stated upon this subject, pp. 332-3:

"When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that [fol. 220] commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. . . .

"Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct,' see *Di Santo v. Pennsylvania*, 273 US 34, 71 L. ed 524, 47 S Ct 267, *supra*; cf. *Wickard v. Filburn*, 317 US 111, ante, 122, 63 S Ct 82, *supra*, not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of com-

merce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause."

The Commission believes there can be no real doubt as to the importance and predominance of the local interest in the regulatory problems involved. The state is vitally interested in the welfare of its industrial gas [fol. 221] users as well as that of its residential and commercial users. It is, in the opinion of this Commission, a specious argument to assert that because competition with other fuels may fix a maximum rate level for such sales, there is no public interest in regulation of sales to such class of consumers. Obviously matters of discrimination, adequacy of service and the level of rates for such service are all ones which warrant and call for the exercise of governmental regulatory power in respect of this class as well as other classes. The further fact that regulation of distribution of gas to the industrial class of consumers cannot, in the public interest, be divorced from that of distribution to other classes of consumers is amply shown by the facts in the record in this case. The importance of these factors has been pointed out in the opinions in *Re Service Gas Company*, 15 P. U. R. (N. S.) 202 (Penn. 1936) and *Re Louisiana-Nevada Transit Company*, 32 P. U. R. (N. S.) 219 (Ark. 1939), cases before state commissions; and factors affecting the problem and calling for careful further legislative consideration, both state and federal, are the subject of an extensive analysis by Mr. Justice Jackson in his concurring opinion in *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 88 L. ed. 333, 358-376 (1944), *supra*.

The Commission concludes that the distribution in Indiana by Panhandle of natural gas direct to consumers is subject to regulation by this Commission under the laws of this state.

[fol. 222]

Order

It is therefore ordered by Public Service Commission of Indiana that each and all of the objections made by Panhandle Eastern Pipe Line Company, the respondent in this cause, to any of the evidence offered in this cause (except

such objections as have heretofore been specifically and finally sustained by the Commission) shall be, and the same and each of them are hereby, overruled; and that all such evidence objected to shall be and is hereby received in evidence in this cause.

It is further ordered that said Panhandle Eastern Pipe Line Company shall, within twenty (20) days after receipt by it of a copy of this order, file with the Bureau of Tariffs of this Commission, in the form prescribed by this Commission, tariffs covering rates, rules and regulations appertaining to any and all sales of natural gas by it direct to ultimate consumers within the State of Indiana.

It is further ordered that said Panhandle Eastern Pipe Line Company shall, within sixty (60) days after receipt by it of a copy of this order, file with this Commission an annual report, in the prescribed form, for each of the Calendar years 1942, 1943 and 1944, and shall hereafter, when and as the same become due and so long as it continues to distribute gas direct to any consumer in Indiana, file with this Commission, on the prescribed form, an annual report for each succeeding year.

[fol. 223] It is further ordered that said Panhandle Eastern Pipe Line Company shall, within sixty (60) days after the receipt by it of a copy of this order, file with this Commission copies (certified by one of its fiscal officers as true copies) of (a) each and all statements appertaining to its property in such form as filed by it with the Federal Power Commission under and pursuant to Order No. 73 of said commission, adopted April 9, 1940, captioned "Order Requiring Submission of Supplemental Data in Connection with Gas Plant Instruction 2-D of the Uniform System of Accounts under the Natural Gas Act," and (b) each and all journal entries or proposed journal entries filed by it with said Federal Power Commission under and pursuant to the requirements of Subdivision B of Account No. 391 "Gas Plant Purchased" of the "Uniform System of Accounts Prescribed for Natural-Gas Companies Subject to the Provisions of the Natural Gas Act" prescribed by said commission, or of Subdivision B of Account No. 392 "Gas Plant Sold" of said Uniform Classification of Accounts.

It is further ordered that this Commission reserve for subsequent determination in this investigation the matter of what, if any, additional reports and information in respect of the property or operations of said Panhandle East-

ern Pipe Line Company this Commission should require to be filed with it by said company.

It is further ordered that this Commission reserve for [fol. 224] subsequent determination in this investigation the steps, if any, to be taken by this Commission if Panhandle shall, without first securing a Necessity Certificate under the provisions of Section 97A of the Public Service Commission Act, commence the supplying of natural gas direct to any consumer in Indiana who was not so served by it on February 26, 1945, and who is located in a rural area as defined in said act.

It is further ordered that the secretary of this Commission shall promptly after the entry of this order (a) mail, first class and registered mail, to said Panhandle Eastern Pipe Line Company at its principal office in Indiana, 601 Illinois Building, 17 West Market Street, Indianapolis 4, Indiana, and also at its principal executive office at 135 South LaSalle Street, Chicago 3, Illinois, copies of this order and of the rules and regulations of this Commission governing the construction and filing of schedules of rates, rules and regulations by public utilities other than inter-urban railways, (b) mail, as printed matter, postage prepaid and insured, to said Panhandle Eastern Pipe Line Company at its said office in Chicago, Illinois, six sets of the form of annual report prescribed by this Commission, and (c) mail, as first class mail and postage prepaid, to counsel of record for said Panhandle Eastern Pipe Line Company, and to each of the other parties to this proceeding and their respective counsel of record, copies of this order; and that said secretary shall forthwith thereafter file in this cause his certificate of such mailings.

[fol. 225] It is further ordered that said Panhandle Eastern Pipe Line Company shall, on or before twenty (20) days after the date of this order, pay into the Treasurer of the State of Indiana, through the Secretary of this Commission, the sum of \$23.59, said amount being the expenses incurred by this Commission in this investigation (including cost of publication of notices of hearing).

Yoder, Carlson and Cannon concur:

Approved: November 21, 1945.

[fol. 226] CONDENSED STATEMENT IN NARRATIVE FORM
OF TESTIMONY OF O. W. MORTON

My name is O. W. Morton. I am an engineer by education and training and have been employed for a number of years by Panhandle Eastern Pipe Line Company as rate engineer. Natural gas supplied by Panhandle Eastern Pipe Line Company for resale to domestic, commercial and some industrial consumers is known as "firm load," while gas supplied either for resale to certain industrial consumers or direct to industrial consumers is known as "interruptible load." Practically all large industrial consumers are served on an interruptible basis. This is specified in Panhandle's contracts with certain distributing companies and large industrial consumers. During periods of extreme cold weather and sometimes in emergencies resulting from mechanical failure, it becomes necessary to cut off part of the interruptible load in order to insure delivery of the firm load. This is known in the industry as the "curtailment" procedure.

During the war period allocation of natural gas and curtailments were subject to the jurisdiction of the War Production Board. In general the carrying out of the procedure, subject to the general order and check of the Board, was left to the individual pipe line companies. Except for certain policies laid down by the Board, these problems were handled by the companies under the same procedure as in normal times. I was designated as the sole representative of Panhandle to handle such matters. My duties were to prepare schedules showing what amount [fol. 227] of "firm" gas could be obtained by curtailment of industrial loads; to prepare telegrams sent out in the curtailment procedure; to compile and graph statistics as to curtailment results in order to furnish information to the company and the Board; and in general to coordinate the operation of the pipe line with the Board's orders. This control ended in October, 1945.

The principal factor in determining the necessity for the extent of curtailment is the existing pressure and the trend at various points along the line. The next most important factor is temperature, both existing and predicted by weather reports. The "line pack," which is the quantity of gas in excess of normal quantities stored in the line at a given time, is also important, as is the mechanical condition

at each of the sixteen compressing stations along the line at intervals of seventy to eighty miles. In considering curtailment it is necessary to consider both the time of the week and the season. Less drastic curtailment is necessary if the emergency arises just before a week-end or near the end of the winter season. All of these conditions vary continually over the entire 1200 mile system.

It is necessary to have regular, accurate information at short intervals of all of these conditions throughout the entire system to consider and determine curtailment necessities. They could not possibly be determined without such information. While curtailments are usually uniform over [fol. 228] the system, conditions arise where it is necessary to curtail at one portion without curtailing others. Sometimes pressures are adequate in the west and central sections and low in the east, but there would be no benefit to the east in curtailing in other sections because the gas would not arrive in time. It takes about three days to travel from Amarillo, Texas to Detroit. Curtailment might become necessary in either Michigan or Illinois to relieve Indiana, and the reverse may be true. It is necessary to be able to curtail at any point in the line where it becomes necessary to carry out firm commitments in other portions.

Curtailment necessity may also be affected by knowledge of the situation of particular customers. No long range program can be laid down as the situation may change either way very quickly.

The mechanics of curtailment as handled by Panhandle are that the necessary information is first received by the dispatcher at the Kansas City office. A Curtailment Committee receives and considers the information and determines whether curtailment is necessary, the quantities necessary, and the sections in which it is required. The dispatcher then sends out the necessary telegrams to distributors and direct industrial consumers and compliance is checked by field men.

As to the necessity of curtailment, the problem is the same whether the gas is sold directly by Panhandle to an industrial consumer or to a local distributing company for resale to such consumer, and involves consideration [fol. 229] of the same elements of pressure, temperature, quantity of line storage, and mechanical conditions of equipment, time of year, time of week, and wind velocity.

The facilities by which the gas at Fortville is delivered to the DuPont Company for consumption and to two distributing companies at Fortville for resale are as follows: All three are served from a three-inch lateral, which takes off of the Greenfield four-inch lateral, which in turn takes off the main line of Panhandle Eastern. The three-inch lateral serving these towns at a point near the town border of Fortville branches into three measuring stations, one for each of the distributing companies and one for the DuPont plant. The gas goes through regulators and then through meters and is delivered at the outlet side of each meter. A reduction of pressure occurs as it goes through the regulator in the meter house. The three-inch line carries about eighty pounds and is reduced, in the case of the DuPont plant, to sixteen pounds before going through the meters, and probably approximately twenty pounds before it goes through the meters to the distributing companies. All of the facilities for the sales to DuPont and the two distributing companies at Fortville were in existence before the DuPont contract was entered into, with the exception of the lateral to Fortville and the facilities for delivery from that lateral.

[fol. 230]

PLAINTIFF'S EXHIBIT No. 3.

Panhandle Eastern Pipe Line Company

Statement of Gas Sold to Certain Utilities and Direct
Industrial Customers in the State of Indiana
October 1943 thru September 1945

MCF

12 Months ended September 1944 Gas Utilities		Billed on Interruptible Industrial Rates	Billed on Other Rates	Total
Central Indiana Gas Co.	5,720,208	3,796,185	9,516,393	
Kokomo Gas & Fuel Co.	224,240	516,490	740,730	
Northern Indiana Public Serv. Co.		2,407,929	2,407,929	
Public Service Co. of Indiana	879,040	2,222,205	3,101,245	
Direct Industrial	760,827		760,827	
12 Months ended September 1945 Gas Utilities				
[fol. 231]				
Central Indiana Gas Co.	6,268,182	3,829,633	10,094,815	
Kokomo Gas & Fuel Co.	201,256	516,891	748,147	
Northern Indiana Public Serv. Co.		2,609,032	2,609,032	
Public Service Co. of Indiana	1,011,368	2,350,474	3,361,842	
Direct Industrial Rate Department, February 25, 1946	1,085,205		1,085,205	

COMMISSION'S EXHIBIT No. 1.

STATE OF INDIANA,
County of Randolph, ss:

PANHANDLE EASTERN PIPE LINE COMPANY, Plaintiff,

vs.

THE PUBLIC SERVICE COMMISSION OF INDIANA, LEROY E.
YODER, LAWRENCE E. CARLSEN, and LAWRENCE W. CANNON,
as members of the Public Service Commission of Indiana,
Defendants

IN THE RANDOLPH CIRCUIT COURT

No. 5440

[fol. 232] WAIVER BY COMMISSION

Comes now the Public Service Commission of Indiana and shows to the court that it has been fully advised as to the evidence which will be introduced at the trial of the above action. Such evidence, in addition to the evidence offered before the Commission in the proceedings before it, is in the form of a deposition and in stipulations agreed upon by attorneys for this Commission and the Panhandle Eastern Pipe Line Co.

This Commission has considered such additional evidence and finds, that if it is believed to be materially different

from that offered upon the hearing before the Commission, that such evidence would not change the order of the Commission entered on November 21, 1945 which this suit is brought to set aside.

The Commission therefore being duly advised now waives the necessity of receiving and considering such evidence in accordance with the provisions of Sec. 8 of Chapter 169 of the Acts of 1929 (Burns' Ind. Stat. Anno. 1933, Sec. 54-436).

Ordered at Indianapolis, Indiana, February —, 1946.

Public Service Commission of Indiana, LeRoy E. Yoder, Chairman; Lawrence W. Cannon, [fol. 233] Lawrence E. Carlson. (Seal of The Public Service Commission, of Indiana.)

Samuel Busby, Secretary.

[fol. 234] IN THE RANDOLPH CIRCUIT COURT

Cause No. 5440.

PANHANDLE EASTERN PIPELINE COMPANY, Plaintiff

vs.

THE PUBLIC SERVICE COMMISSION OF INDIANA, et al., Defendants

SUPPLEMENTAL STIPULATION OF FACTS

It is hereby agreed by and between the parties hereto that this Stipulation when introduced in evidence in this cause shall have the same force and effect as though the matters hereinafter set forth had been proved by competent evidence introduced in said cause. However, the defendant Commission does not by this Stipulation intend to waive or waive any objections heretofore made to the filing of the supplemental complaint or the reopening of the case for further evidence or the relevancy of the order of the Commission made April 9, 1946.

1. On March 21, 1946 plaintiff in this cause filed with the defendant the Public Service Commission of Indiana in Cause No. 16741 pending before said Commission entitled "In the Matter of the Investigation by the Commission in Respect of the Distribution by Panhandle Eastern Pipe Line Company, as a Public Utility, of Natural Gas to

Consumers Within the State of Indiana," being the same proceeding as the one complained of in this action, a document entitled "Offer of Respondent to Furnish Information Designated by Commission Order Dated November 21, 1945, on Condition that the Same Be Accepted by the Commission as Information Only and That Said Order Dated November 21, 1945 Be So Modified as to State Unequivocally that It Involves No Assertion of Any Jurisdiction or Authority of the Commission to Regulate the Business of Respondent of Selling and Directly Delivering Natural Gas [fol. 235] Transported in Interstate Commerce to Industrial Consumers in the State of Indiana, and Seeks the Filing of the Reports and Documents Designated in Said Order for Information Purposes Only." A true and correct copy of said document, omitting formal parts, is contained in the document attached hereto, made a part hereof and marked "Exhibit A."

2. On April 9, 1946 the defendant herein, The Public Service Commission of Indiana, made and entered in said Cause No. 16741 an order entitled "First Supplemental Order." "Exhibit A" attached hereto and made a part hereof is a true and correct copy of said "First Supplemental Order."

George M. Beamer, Barnes, Hickman, Pantzer and Boyd, Attorneys for Plaintiff; James A. Emmert, Attorney General; Frank E. Coughlin, First Assistant Attorney General; Urban C. Stover, Deputy Attorney General; Wm. P. Evans, Attorneys for Intervenor.

[fol. 236] EXHIBIT "A" TO STIPULATION OF FACTS

Before the Public Service Commission of Indiana

Cause No. 16741

In the Matter of the Investigation by the Commission in Respect of the Distribution by Panhandle Eastern Pipe Line Company, as a Public Utility, of Natural Gas to Consumers Within the State of Indiana

First Supplemental Order. Approved: April 9, 1946

BY THE COMMISSION:

On November 21, 1945, this Commission entered its order (Original Order) in the above entitled cause wherein, among other things, it ordered the respondent herein, Panhandle Eastern Pipe Line Company (Panhandle), within times prescribed in such order, to file with the Bureau of Tariffs of the Commission tariffs covering rates, rules and regulations appertaining to any and all sales of natural gas by it direct to ultimate consumers within the State of Indiana, and to file with the Commission certain designated annual reports, and to file with the Commission certain information appertaining to the plant and property of Panhandle. Panhandle did not comply with any of the provisions of the Original Order, but on or about January 2, 1946 took an appeal (the Appeal) from said order to the Randolph Circuit Court. The Appeal was docketed as Cause No. 5440 in said court.

On March 21, 1946 respondent filed in this Cause No. 16741 a document captioned "Offer of Respondent to Furnish Information Designated by Commission Order Dated November 21, 1945, on Condition that the Same be Accepted by the Commission as Information only and that Said Order Dated November 21, 1945 be so modified as to State Unequivocally that it Involves no Assertion of any Jurisdiction or Authority of the Commission to Regulate the Business of Respondent of Selling and Directly Delivering Natural Gas Transported in Interstate Commerce to Industrial Consumers in the State of Indiana, and Seeks the Filing of the Reports and Documents Designated in Said

Order for Information Purposes Only" (Respondent's Offer). The content of Respondent's Offer is as follows:

"Comes now Panhandle Eastern Pipe Line Company and respectfully shows this Honorable Commission:

"1. That this Respondent has at all times throughout this proceeding asserted and insisted and continues to assert and insist, that it is engaged solely in [fol. 237] interstate commerce in the State of Indiana, that this Commission consequently has no jurisdiction of Respondent or its business, and that any statute of Indiana construed to purport to confer such jurisdiction as applied to Respondent and its business is void because in violation of Article I, Section 8(3) of the Constitution of the United States.

"2. That Respondent has asserted and continues to assert such position in the proceeding to set aside and vacate such order in Cause No. 5440 in the Randolph Circuit Court entitled *Panhandle Eastern Pipeline Company v. The Public Service Commission, et al.*, which cause has been heretofore tried in said Court and taken under advisement.

"3. That at the time said action was commenced Respondent in good faith understood and believed and still believes that said order dated November 21, 1945, constituted and constitutes an assertion of the right and authority to regulate the rates and service of Respondent in its business of selling and directly delivering natural gas transported in interstate commerce to certain industrial consumers as shown by the record in said cause which business Respondent contends is protected from such regulation by Article I, Section 8(3) of the Commerce Clause.

"4. That this Commission has now asserted by arguments and brief in said action in the Randolph Circuit Court that the papers and documents which Respondent is ordered to file by said order dated November 21, 1945 are sought by it for information purposes only and not as an assertion of jurisdiction to regulate Respondent's rates and service for direct sales and deliveries to industrial consumers within the State of Indiana.

"5. Respondent denies that the Commission is authorized by law to require the filing of the papers and documents ordered filed by said order dated November 21, 1945 for the reason that the same are not relevant to the exercise of any jurisdiction which the Commission possesses and no part of the business of Respondent is subject to its jurisdiction. However, Respondent has no desire to withhold from the Commission any matters designated in said order which are desired solely for information purposes, even though the preparation and filing of the same hereafter will be burdensome to Respondent, *provided* the filing of the same would in no way prejudice its position that the Commission has no jurisdiction or authority to regulate its said business in the event that any attempt to regulate the same should hereafter be made by the Commission. In view of the assertions heretofore [fol. 238] made in said order and now made by the Commission in arguments and briefs in said cause in the Randolph Circuit Court that the Commission has such regulatory jurisdiction, Respondent cannot be certain that it would not be prejudiced in said position if it should comply with the order as now entered unless the Commission by modification thereof specifically states in its order that said papers and documents are sought for information purposes only, and that said order is not to be construed as an assertion of any regulatory jurisdiction of Respondent or its business.

"6. Respondent therefore now offers to file with the Commission all papers and documents specified in the order dated November 21, 1945, *provided* the Commission desires the same for information purposes only and not as an assertion of regulatory jurisdiction of Respondent's business, and *provided* said order is so modified or such further order is entered by the Commission as to preclude the possibility of any contention hereafter that Respondent will be in any manner prejudiced in its right to contest the jurisdiction of the Commission to regulate its said business in the event the Commission shall hereafter assert the right, power, authority or jurisdiction to regulate the same.

"7. In the event that the order of the Commission dated November 21, 1945 is so modified or such further

order is entered as to protect Respondent from any prejudice in its right to contest hereafter the jurisdiction and authority of the Commission to regulate its said business in the event that the Commission shall hereafter assert the right, power, authority or jurisdiction to regulate the same, Respondent will furnish the information designated in said order dated November 21, 1945 within such reasonable time as shall be designated by the Commission and will dismiss said action now pending in the Randolph Circuit Court without prejudice and at its costs.

"8. While Respondent is willing to afford the Commission a full opportunity to consider and accept or reject the proposal herein made, attention is called to the fact that the time for filing Respondent's reply brief in said cause in the Randolph Circuit Court will expire on Thursday, March 28, 1946 and that said cause will then be ready for decision by that Court."

On or about March 28, 1946 Panhandle filed in the Appeal its application for leave to file a supplemental complaint relative to Respondent's Offer.

[fol. 239]—The Commission certainly has no desire that any of the parties to this cause, or the court before whom the Appeal is pending, or any consumer, public utility or other interested person, should be in any doubt as to the conclusions to which the Commission came in this cause as to its regulatory jurisdiction over sales direct to Indiana consumers of natural gas that has moved into the state in interstate commerce. The Commission thought that position was made as clear as language could make it by the findings and opinion in the Original Order. Though not required by statute to incorporate in an order either findings or opinion, the Commission did in the Original Order, because of the importance of this matter and to the end that the parties should be fully informed as to its conclusions, set forth in detail both its findings and its opinion as to its regulatory control. After an extended discussion of its views, the Commission said unequivocally therein (p. 82) that it concluded "that the distribution in Indiana by Panhandle of natural gas direct to consumers is subject to regulation by this Commission under the laws of this state." Those laws place on the Commission, as the state regulatory agency, the power and duty, whenever action is

necessary in the public interest, to make reasonable regulations of rates and service. This duty the Commission proposes to exercise when and as public interest requires action. The conclusion above quoted did and does express its position on this question.

The Commission has consistently reiterated this position in two other regulatory proceedings in each of which Panhandle was a party or had representatives present.

In *Panhandle Eastern Pipe Line Company, et al.*, Docket Nos. G-661 and G-688 before the Federal Power Commission, being proceedings involving the question whether Panhandle would be permitted by regulatory authorities to transport through its pipe line system large additional amounts of gas to be sold to a new industrial consumer, the Commission intervened in the interest of the consumers in the State of Indiana and opposed the use of the pipe line for such transportation on the ground that such system did not have sufficient capacity even to supply adequately existing consumers. In the hearing in those proceedings in January 1946, the federal commission called for, and the full federal commission listened to, arguments on the jurisdictional issue in which the Commission, as an intervenor, participated. In that argument the Commission stated:

“ * * * The Indiana Commission believes that the Natural Gas Act has completely closed the gap in the regulation of gas moving in interstate commerce for public distribution.

“Assuming adequate state law, we believe that between the States and the federal agency the entire field has been covered. We have given much and careful consideration to the question of the division of federal and state regulatory powers in this interstate gas field, and it is our studied conviction that we have been [fol. 240] entrusted, under the powers remaining with us under our state statutes, with the full and complete regulation of all direct sales to consumers, residential, commercial or industrial, of natural gas moving in interstate commerce.

“This jurisdiction, we believe, extends both to the consumer rates and service of such sales, and includes the control and regulation by the State of those facilities of movement, metering and regulating which appertain *solely* to the direct customer service.

"On the other hand, we recognize fully your own jurisdiction and control over *the interstate transportation* of all such gas by the natural gas company, (1) until and including the sale in cases of sale for resale, and (2) up to and including the point where the gas is broken out of the interstate stream and placed in facilities used solely for the local sale, in cases of gas sold direct. For example, in a direct industrial sale by a pipe line company, such as the one in issue here, it is our view that the facilities beyond the valve take off in the transmission line are facilities of the local service and subject to state control; but that the facilities before such point, including the valve and other facilities used in the breaking out from the interstate stream of the gas to be sold to a consumer direct, are facilities subject to your jurisdiction and control.

"And we recognize, too, your full control and jurisdiction of the gas while in its interstate movement even though it is to be sold direct to a consumer; and your full right and power to determine the question of whether or not such facilities used or useful for that interstate transportation may in the public interest be used to move such gas to the point where our regulation begins, or must, because of prior rights of other consumers, inadequacy of facilities or other adequate causes, be used for other transportation.

"We believe this construction of the line of demarcation between state and federal powers is the one fixed by the Natural Gas Act. We believe the point of division of powers between you and us has been wisely so placed.

"We believe that under that division you have the full and complete authority in the instant case to determine whether or not this volume of gas which Panhandle Eastern Pipe Line Company proposes to sell direct can be brought to, or broken out at, the point where state regulation would pick up.

[fol. 241] "We are confident that in exercising that jurisdiction and determining the issues, you will give fair and full consideration to the rights and protection of all areas and all classes of consumers along this pipe line who are dependent upon its capacity for such gas as they need to meet their requirements for this essential public utility service. • • •"

The Commission also participated, on February 19 and 20, 1946 at the Chicago hearings in the general Natural Gas Investigation (Docket No. G-580), which is now being conducted by the Federal Power Commission. At that hearing, Panhandle had representatives present. The Commission there again stated its position as to its regulatory power over gas sold direct to Indiana consumers as follows:

“ . . . Adequate regulation of this supply, giving assurance that it will be available to consumers in the state, continuously and in adequate amounts, at fair and reasonable prices, and without unwarranted discriminations either between classes of users or those within a class, is of vital importance to the welfare of the state and its citizens. . . .

“ We believe that the transportation and sale of natural gas is a business affected with a public interest, that it is inherently and necessarily, if economic waste is to be avoided, generally monopolistic in character, and that full and adequate regulation thereof is essential if the public interest is to be protected. We believe this regulation and protection can best be afforded and local interests best dealt with through the existing policy of the Natural Gas Act of leaving to state regulatory authority the control over rates and service in cases of all direct consumer sales, and placing in the federal agency the full control over the interstate transportation of the gas and over its sale for resale. We believe the public interest can and will be best served through the cooperative efforts of these agencies as each functions within its own sphere. . . .

“ As we have before said, we believe that Congress has left with each state the control and regulation of direct sales to consumers within such state. We think, state law being adequate, this regulatory power exists in cases of all classes of direct service to consumers, residential, commercial and industrial, small or large. We believe the unification of regulation of all direct consumer sales in the state regulatory agency is a wise and sound one, and one that the legislative history of the Natural Gas Act shows clearly to have been the congressional intent. We think that this line of demarcation of regulatory control is clearly one permitted

by the federal constitution and that it should be fully preserved in any legislation amendatory to the act."

[fol. 242] Appearing as a participant in that hearing, the Commission further stated in answer to specific questions relative to direct consumer sales, as follows:

"In fact, our Commission has gone on record, as most of you probably well know, holding that we have legislative authority, which we propose to exercise governing all sales, irrespective of whether those sales are from a distributing utility or direct sales from a pipe line."

The position of the Commission, as determined from its investigation in this cause, was and is that it has jurisdiction over sales direct to consumers by Panhandle of natural gas that has moved into the state in interstate commerce; that Panhandle has the duty and obligation to file with the Commission, and keep on file, the tariffs, reports and accounting information required of public utilities by the statutes of the State of Indiana and the Commission's rules and regulations now in effect or from time to time promulgated; that the only lawful rates, rules and regulations for natural gas service by Panhandle direct to consumers in Indiana would be those filed by Panhandle with the Bureau of Tariffs of the Commission and in effect pursuant to the provisions of the Public Service Commission Act and the Commission's rules and regulations promulgated thereunder; contained in such tariffs, reports and other data for any and all lawful purposes necessary or advantageous in the performance by it of its duties and responsibilities as the state regulatory agency of public utility services; and that the Commission will, if, when and as the public interest requires, regulate rates and service of natural gas sales by Panhandle direct to Indiana consumers, and believes that it has authority so to do.

For some reason counsel for Panhandle, in their brief and in their oral argument in the Appeal, asserted that the Commission has no use for and does not need the information required to be filed by the Original Order for any purpose or use other than the regulation of sales to industrial consumers; and counsel have dogmatically asserted that "if no such right of regulation exists, the order made is

unlawful and should be vacated and set aside." (Bf., P. 9) Such statements are not correct factually, and in the opinion of the Commission, the conclusion of counsel is wholly erroneous. The actual experience of the Commission in connection with the two federal proceedings above referred to have amply demonstrated to it the need of such and other information for numerous purposes. Members of the Attorney General's staff both in their oral argument and in their subsequent brief in the Appeal demonstrated the fallacy of counsel's claim and pointed out some of these purposes. Counsel apparently now wants that demonstration translated into an abandonment of the Commission's expressed position of regulatory power. The Commission has been particularly concerned lest failure to reiterate its position might be taken as silent approval of their assertions. Such an assumption would be opposite to the fact, but the Commission has concluded it should affirmatively point this out in acting on Respondent's Offer.

[fol. 243] The Commission seeks the information directed to be filed by the Original Order for any and all uses to which it may be put by the Commission in the exercise of its statutory functions and the performance of its duties. Its use will not be limited to rate and service regulation of direct sales to Indiana consumers, but this broader use will not exclude the use for rate and service regulation of such sales. An example of this broader use appears in connection with the two proceedings above referred to. Certain of the information needed for participation in those proceedings, and for determination of the necessity of such participation, would have been available if the Original Order had been complied with. Experience in those proceedings also has shown a necessity for broadening the information called for in annual or periodic reports. The importance to the public of a continuous check on natural gas pipe line capacity and use has been strongly impressed on the Commission by the experiences of the past winter. Action by regulatory agency in advance of an actual break-down of service is a greater aid to the public than remedial action after break-down. Conditions arising this winter have spot lighted the essentialness of vigilance by the state regulatory agency if an adequate supply of gas is to be had for Indiana consumers. Severe, and what the Commission believes to have probably been arbitrary and discriminatory, curtailments in the gas supply to Indiana industrial consumers using gas

from the Panhandle system, were made by Panhandle during this past winter. The complaints to the Commission by such curtailed consumers, and their reports as to the effect of the curtailments on the production operations and employment in their establishments, convinced the Commission of the seriousness of the situation from the public standpoint. It actively sought and obtained assistance from the Federal Power Commission in respect of lessening these curtailments. During the same period facts came to light which disclosed that Panhandle was attempting to take on an additional large industrial load on its system. The supplying of such load would have seriously impaired the existing service to industrial consumers in Indiana. On behalf of the consuming public, the Commission appeared as intervenors in the investigation of the Federal Power Commission of this matter (Dockets No. G-661 and No. G-688), but most of the factual information had to be developed from examinations and studies of transmission capacities and loads which was in the files of the Federal Power Commission, and this handicapped the Commission in discovering the problem and dealing with it.

The position of the Commission is that its functions include, when and as necessary in the public interest, the regulation of rates and service in cases of sales directly to Indiana consumers. There are many purposes and uses, in the exercise of the regulatory and other duties placed upon the Commission by law, for which the Commission shall undoubtedly make use of the data which are required to be supplied now and from time to time by Panhandle under the Indiana statute and the Original Order. Some of those uses were pointed out by the Attorney General both in his oral argument and in the brief subsequently filed. It [fol. 244] is not necessary to repeat or expand the list. The uses which will be made of the information supplied will be all such as the public interest require. Certainly without the information the Commission is and will be handicapped in the exercise of many of its regulatory functions and the public, in whose interest the Commission functions, is injured thereby.

The Commission desires to add a word as to the reservation in the Original Order relative to further action by the Commission if Panhandle undertook to sell gas direct to DuPont without complying with Section 97A of the Public Service Commission Act. The issue in such

supplemental investigation would involve the provisions of Section 97A of the Act, and issue additional to those dealt with in the Original Order. Panhandle had not at the time of the hearings or the order commenced any service to DuPont. In such a situation, the Commission had no power to order anything in respect of DuPont at that time. The Commission was not called upon to assume that, in the light of the views expressed in the Original Order, Panhandle would ignore the state and commence direct service to DuPont merely upon its own ideas of the scope of Section 97A. Panhandle could have submitted that question to the Commission for determination before it commenced the service, and it can still do so if it sees fit. In any such petition, Panhandle can assert a lack of jurisdiction, and any order made, if not acceptable to Panhandle, is appealable to the Courts. Such procedure is not unknown to Panhandle. Panhandle took exactly that kind of a course in an application to the Federal Power Commission which is docketed as Docket No. G-693 and in which docket the Commission was a party intervenor. But with the State of Indiana, Panhandle saw fit to ignore the statutory provisions, and saw fit to commence the service and then advise the Commission that it had done so. In that situation, Panhandle has, with its eyes open, assumed the risks of the course it selected. There is nothing in the Original Order that in any way creates or increases that risk. If, however, Panhandle does not see fit promptly to file a petition for a Necessity Certificate under Section 97A, the Commission proposes to proceed at the earliest date consistent with its other duties and the demands made by them upon it and its staff, with an investigation of the status of Panhandle's DuPont service in the light of Section 97A.

It is therefore ordered by the Public Service Commission of Indiana that the request contained in Respondent's Offer that the Commission modify, change or limit the scope of the Original Order be and the same is hereby denied; that Respondent's Offer be, and the same is hereby, rejected by the Commission; that a conditional filing, as proposed by Panhandle in Respondent's Offer, of the tariffs of rates, rules and regulations, the annual reports and the accounting information, or any of them, required to be filed by Panhandle by and under the Original Order will not constitute compliance with the Original Order, and that

the tariffs of rates, rules and regulations, the annual reports and the accounting information, when filed, shall be deemed to be on file for, and to be available for use by the Commission for, all purposes and uses required or permitted by the provisions of the Public Service Commission Act and the rules and regulations of the Commission promulgated thereunder, including, but without limitation, the use thereof in and in connection with the regulation of rates and service appertaining to the supplying [fol. 245] of natural gas by Panhandle direct to consumers within the State of Indiana.

It is further ordered that the Secretary of the Commission shall promptly after the entry of this first supplemental order (a) mail, first class and registered mail, to Panhandle at its principal office in Indiana, 601 Illinois Building, 17 West Market Street, Indianapolis 4, Indiana, and also at its principal executive office at 135 South LaSalle Street, Chicago 3, Illinois, copies of this first supplemental order, and (b) mail, as first class mail and postage prepaid, to counsel of record for Panhandle, and to each of the other parties to this proceeding and their respective counsel of record, and to the honorable judge of the Randolph Circuit Court at Winchester, Indiana, copies of this first supplemental order; and that said Secretary shall forthwith thereafter file in this cause his certificate of such mailings.

Yodder, Carlson, and Cannon concur.

Approved: April 9, 1946.

I hereby certify that the above is a true and correct copy of order as approved.

— — —, Secretary to Commission.

[fol. 246] And afterwards, to-wit: On the 22nd day of July, 1946, the same being the 48th judicial day of the May Term, 1946 of the Supreme Court of Indiana, the following proceeding was had.

Comes now the appellant by counsel and petitions the court to bind the transcript of this cause, in three volumes, with proof of service which petition is in the words and figures following to-wit: (H. I.).

And the court being advised in the premises, grants said petition as prayed.

And afterwards, to-wit: On the 3rd day of August, 1946, the same being the 59th judicial day of the May Term, 1946, the following proceeding was had.

Comes now the parties by counsels and files the transcript in this cause, "Record, 3 Vol. Assignment of Errors, two sets. Petition of certain appellants to adopt statement of record in brief filed by Public Service Commission. Petition granted and cause submitted under Rule 2-14.

[fol. 247] IN THE SUPREME COURT OF INDIANA

No. 28225

THE PUBLIC SERVICE COMMISSION OF INDIANA, etc., et al.,
Appellants,

vs.

PANHANDLE EASTERN PIPE LINE COMPANY, Appellee

Appeal from the Randolph Circuit Court

ASSIGNMENT OF ERRORS—Filed August 3, 1946

The appellants in the above entitled cause, the Public Service Commission of Indiana, LeRoy E. Yoder, Lawrence E. Carlsen and Lawrence W. Cannon, as members of the Public Service Commission of Indiana, for their separate and several assignment of errors in said cause, each separately and severally says there is manifest error in the judgment and proceedings, prejudicial to said appellants and each of them in the cause in that:

1. The court erred in overruling the separate and several motion for new trial filed by each of said appellants.

2. The court erred in receiving and considering the supplemental complaint and order of the Commission entered after this case was filed by the appellee and tried.

Wherefore, the appellants pray that the judgment in [fol. 248] this cause be reversed.

Respectfully submitted, (Signed) James A. Emmert,
Attorney General of Indiana. Frank E. Coughlin,
First Assistant Attorney General. Urban C.
Stover, Deputy Attorney General. Karl J. Stipher,
Deputy Attorney General.

[File endorsement omitted.]

[fol. 249] IN THE SUPREME COURT OF INDIANA

No. 28225

THE PUBLIC SERVICE COMMISSION OF INDIANA, etc., et al.,
Appellants,

vs.

PANHANDLE EASTERN PIPE LINE COMPANY, Appellee

Appeal from the Randolph Circuit Court

ASSIGNMENT OF ERRORS—Filed August 3, 1946

The appellants in the above entitled cause, Indiana Gas & Water Company, Inc., Central Indiana Gas Company, Northern Indiana Public Service Company, Kokomo Gas & Fuel Company, Southern Indiana Gas & Electric Company and Greenfield Gas Company, Inc., for their separate and several assignment of errors in said cause, each separately and severally says there is manifest error in the judgment and proceedings, prejudicial to said appellants and each of them, in the cause in that:

1. The Court erred in overruling the separate and several motion for new trial filed by each of said appellants.

Respectfully submitted, Indiana Gas & Water Company, Inc., (Signed) William P. Evans, Edmond [fol. 250] W. Hebel, Its Attorneys. Central Indiana Gas Company, (Signed) Robert R. Batton, Carl E. Hartley, Its Attorneys. Northern Indiana Public Service Company, (Signed) John C. Lawyer, R. Stanley Anderson, Its Attorneys. Kokomo Gas

& Fuel Company, (Signed) John E. Fell, Its Attorney. Southern Indiana Gas & Electric Company, (Signed) Edmund F. Ortmeier. Greenfield Gas Company, Inc., (Signed) William A. McClellan, Its Attorney.

[File endorsement omitted.]

[fol. 251]. And afterwards, to wit: On the 7th day of August, 1946, the same being the 62nd judicial day of the May Term, 1946, the following proceeding was had in this cause.

Comes now the National Association of Railroad & Utilities Commission and files a petition to participate as Amicus Curiae, which petition is in the words and figures following, to-wit: (H. I.).

And afterwards, to-wit: On the 9th day of August, 1946, the same being 64th judicial day of the May Term, 1946 the following proceeding was had in said cause.

Comes now the parties by counsel and the court being advised in the premises grants the petition of National Association of Railroad & Utilities Commission to file as Amicus Curiae.

And afterwards, to-wit: On the 19th day of August, 1946, the same being the 72nd judicial day of the May Term, 1946, the following further proceedings were had in said cause.

Comes now the Indiana Gas & Water Co., Inc., et al., and files a separate brief (9) with proof of service and a request for oral argument. (H. I.).

And afterwards to-wit, on the 30th day of August, 1946, the same being the 82nd judicial day of the May Term, 1946, [fol. 252] the following proceeding was had in this cause.

Comes now the Public Service Commission by counsel and files their briefs (9) with proof of service. (H. I.)

And afterwards, to-wit: On the 3rd day of September, 1946 the same being the 85th judicial day of the May Term, 1946, the following proceeding was had in said appeal.

Comes now the National Association of Railroad & Utilities, and files their briefs (9) amicus curia- with proof of service. (H. I.).

And afterwards, to-wit: On the 24th day of September, 1946, the same being the 103rd judicial day of the May Term, 1946, the following proceeding was had in said appeal.

Comes now the appellees by counsel and files a petition for time with proof of service, which petition is in the words and figures following, to-wit: (H. I.). And the Court being fully advised in the premises, grants said petition, and time is extended to and including October 10, 1946.

And afterwards, to-wit: On the 5th day of October, 1946, the same being the 113th judicial day of the May Term, 1946, the following proceedings were had in said cause.

[fol. 253] Comes now the appellee by counsel and files briefs (9) and proof of service, which brief is in the words and figures following, to-wit: (H. I.).

And afterwards, to-wit: On the 10th day of October 1946, the same being the 117th day of the May Term, 1946, the following further proceedings were had in said cause.

Come now the parties by counsel and the court, being advised in the premises, sets the oral argument in the above entitled appeal for November 19, 1946 at ten o'clock A. M., with two hours on each side.

And afterwards, to-wit: On the 19th day of October 1946, the same being the 125th day of the May Term, 1946, the following further proceedings were had in said cause.

Comes now the appellants, Indiana Gas & Water Company, Inc., et al. and files their Reply Briefs (9) and proof of service. (H. I.).

And afterwards, to-wit: on the 19th day of October 1946, the same being the 125th day of the May Term, 1946, the following further proceedings were had in said cause.

Comes now the appellants, Public Service Commission and files reply brief (9) and proof of service. (H. I.).

[fol. 254] And afterwards, to-wit: On the 2nd day of November 1946, the same being the 137th day of the May term the following proceeding was had in said cause.

Comes now the appellees and files additional authorities (10) with proof of service.

And afterwards, to-wit: On the 19th day of November 1946, the same being the 151st day of the May Term, 1946, the following proceedings were had in said cause.

Comes now the appellants by counsel and files notes on the oral argument which notes are in the words and figures following to-wit: (H. I.).

And afterwards, to-wit: On the 20th day of November 1946, the same being the 152nd day of the May Term, 1946, the following proceedings were had in said cause.

Comes now the appellees by counsel and files notes

on the oral argument which notes are in the words and figures following, to-wit: (H. I.).

And afterwards, to-wit: On the 5th day of February 1947, the same being the 63rd day of the November Term, 1946, the following proceedings were had in said cause.

[fol. 255] Come now the parties by counsel and the court, being advised in the premises, reverses the judgment of the court below with the following opinion pronounced by Young, J.

IN THE SUPREME COURT OF INDIANA

No. 28225

THE PUBLIC SERVICE COMMISSION OF INDIANA, etc., et al.,
Appellant,

vs.

PANHANDLE EASTERN PIPE LINE COMPANY, Appellee

Appeal from the Randolph Circuit Court

OPINION—Filed February 5, 1947

[fol. 256] In this case we have to do with the right of the State of Indiana to regulate service and fix rates upon deliveries of natural gas from an interstate pipe line direct to large industrial consumers within the State.

Appellee owns a large pipe line, through which it transports natural gas from Texas and Kansas into and across intervening states, including Indiana, to Ohio and Michigan. At different points along this line, gas is diverted into branch or lateral lines, smaller in size and at lower pressure, to be delivered to distribution systems owned and operated by various municipalities and public utility corporations and directly to selected, large industrial consumers of gas within practical distance of its through line.

When these proceedings started appellee furnished gas in Indiana to 10 utilities, including the corporate appellants, and four municipalities who, in turn, distributed such gas to 112,000 residential, industrial and commercial consumers in Indiana. One of these laterals takes off from the main line near Winchester, Indiana, and at the end of this lateral there are two branches, one leading to a meter house,

through which deliveries are made to Indiana-Ohio Public Service Company, which owns a distribution system serving Winchester and nearby territory. The other branch leads to another meter house, through which gas is delivered direct to the Anchor-Hocking Glass Corporation for its own consumption. Service to Anchor-Hocking is, and service to other large industrial consumers will be, under special, privately negotiated contracts, each upon terms agreed [fol. 257] upon for its particular case.

Appellee's gas enters Indiana at a pressure of about 250 pounds per square inch in 22 inch mains. After reaching Indiana the pressure is reduced to approximately 200 pounds per square inch in 15 inch mains. When the Winchester lateral leaves the main line, pressure is reduced to 80 or 100 pounds per square inch and there is no provision whereby it may ever be returned to the main line. Thereby it is segregated from the gas flowing interstate in the main line but the continuity of flow from the source to the meter houses is not interrupted. At the meter houses referred to pressure is again reduced and some deliveries are made to Anchor-Hocking at 40 pounds per square inch and some at 10 pounds per square inch. Deliveries are made to the Indiana-Ohio Public Service Company at 9 to 25 pounds per square inch. In both cases all facilities up to the pipe on the outlet side of the meter houses are owned and operated by appellee. The Winchester lateral is located in part on public highways in Randolph County pursuant to authority granted by the Board of Commissioners of that county to a predecessor of appellee which built the line. For what significance it may have, we know judicially that appellee's main line and other laterals could not cross the state and branch out into areas served without at least crossing highways and probably otherwise using same pursuant to arrangement with local Governmental units.

[fol. 258] The quantity sold to Anchor-Hocking is many times the quantity sold to the Indian-Ohio Company. Anchor-Hocking was the only industrial consumer in Indiana served direct by the appellee at the time of the commencement of these proceedings. Subsequently, however, service direct to a DuPont plant, near Fortville, Indiana, was undertaken under contract and appellee had adopted a policy of furnishing gas direct to selected large industrial consumers in Indiana, as it is doing in other

states. Before appellee began serving Anchor-Hocking, Anchor-Hocking had been buying its gas from a local distributing utility which, in turn, had purchased it from appellee or its predecessor.

It appears that in like manner, as appellee begins service direct to other large industrial consumers, it will, in most, if not all, instances supplant service by local public utility companies. These local distribution utilities have expressed alarm that taking away their large customers, thereby decimating the volume of their sales, will cripple their ability to serve domestic and small commercial and industrial consumers at fair rates.

In this situation, the Public Service Commission of Indiana instituted an investigation of the affairs of the appellee so far as same relate to sales of gas under contract direct to Anchor-Hocking Glass Corporation or any other industrial consumer or consumers of natural gas within the State of Indiana. (Sec. 54-1f2 Burns' 1933.) The corporate appellants intervened. This investigation resulted in an order on November 21, 1945, by the Public [fol. 259] Service Commission of Indiana, requiring appellee to file with the Commission its tariffs covering rates, rules and regulations pertaining to any and all sales of natural gas by appellee direct to ultimate consumers within the State of Indiana, and to file annual reports on forms prescribed by the Commission, so long as it continues to distribute gas direct to any consumer in Indiana, and to file certain other relevant reports and data. In the original order, the Commission concluded and said "that the distribution in Indiana of natural gas direct to consumers is subject to regulation by this Commission under the laws of this state." It was contended by appellee that the Commission's order constituted an assumption of jurisdiction to regulate appellee's rates and service direct to consumers in Indiana, and that such regulation could not be accomplished without violation of the Commerce Clause of the Federal Constitution. Accordingly appellee filed a statutory action to secure a judicial review of said order and to have said order set aside and its enforcement enjoined.

In the course of the hearing in the trial court, the appellant Commission contended that the action was premature because the order complained of merely required information which it was entitled to have, regardless of its

power, or lack of power, to fix rates or otherwise regulate sales of gas by appellee directly to large industries for use by them in Indiana, and that no action will lie to test such power until the Commission attempts to exercise same. Acting upon this contention of counsel for the appellant [fol. 260] Commission, appellee offered, in writing, to file with the Commission "all papers and documents specified in the order dated November 21, 1945, provided the Commission desires the same for information purposes only and not as an assertion of the regulatory jurisdiction of respondent's business, and *provided* said order is so modified or such further order is entered by the Commission as to preclude the possibility of any contention hereafter that Respondent will be in any manner prejudiced in its right to contest the jurisdiction of the Commission to regulate its said business in the event the Commission shall hereafter assert the right, power, authority or jurisdiction to regulate the same."

The Commission declined to accept appellee's filing of the required papers upon the conditions named in the appellee's offer and, in doing so, the appellant Commission made a supplemental order in which it asserted categorically that the tariffs, rates, rules and regulations, the annual reports and the accounting information, required by the original order when filed, shall be deemed to be on file and be available, among other things, for use by the Commission "in connection with the regulation of rates and service appertaining to the supplying of natural gas by Panhandle direct to consumers within the State of Indiana." Notwithstanding the language of the original and supplemental orders, the Commission continues to take the position that its power to regulate appellee's sales and deliveries of gas direct to large consumers in Indiana is not involved in this proceeding.

[fol. 261] With this contention we cannot agree.

On authority of *Public Utilities Commission v. United Fuel Gas Co.* (1943), 317 U. S. 456, 459, 465, 468, 87 L. Ed. 396, 398, 401-403, we hold that the orders of the Commission, in this case, constitute an unequivocal assertion of power and jurisdiction to regulate and fix rates upon sales of natural gas from appellee's interstate pipe line direct to large industrial consumers of gas in Indiana, and that they were sufficient to present to the trial court and to this court the question of the jurisdiction and power of

appellant Commission to fix rates for such sales and service and to make regulations with reference to same.

The trial court reached the conclusion that the delivery of natural gas by appellee direct to industrial consumers connected with its lines constituted interstate commerce and that the orders of the Public Service Commission of Indiana under attack violated the commerce clause of the Federal Constitution, and it vacated and set aside the orders of the Public Service Commission of Indiana complained of and enjoined the Commission and the members thereof from enforcing said orders or any paragraph thereof. The Public Service Commission of Indiana, and the individual members thereof, filed a motion for a new trial and same was overruled. Likewise the corporate appellants filed motions for a new trial, which were overruled and appeals were taken to this court.

In determining whether or not the Indiana Commission [fol. 262] has jurisdiction to regulate and fix rates for deliveries of gas by appellee, direct to large industrial consumers in Indiana, we should first consider whether such deliveries constitute intrastate commerce. If they do then the state may regulate and what the Indiana Commission has done does not violate the commerce clause of the Federal Constitution. But if they constitute interstate commerce that does not necessarily mean the state may not, under any circumstances, intervene.

Natural gas is a commodity which may be transported as an article of commerce. Its transmission from one state to another constitutes interstate commerce. *State ex rel. Corwin v. The Indiana and Ohio Oil, Gas, and Mining Co.* (1889), 120 Ind. 575, 577, 579, 22 N. E. 778; *Pennsylvania v. West Virginia* (1923), 262 U. S. 553, 596, 67 L. Ed. 1117, 1132; *Missouri ex rel. Barrett v. Kansas Natural Gas Co.* (1924), 265 U. S. 298, 307, 68 L. Ed. 1027; *Public Utilities Commission v. Landon* (1919), 249 U. S. 236, 245, 63 L. Ed. 577.

Appellee contends that under the rule just stated where gas flows continuously without interruption from out-state gas fields direct to in-state consumers, the deliveries to in-state consumers constitute interstate commerce. We recognize that this is a sound conclusion, but it is contended by appellants that there is interruption in the flow of gas to Anchor-Hocking and that the sales and deliveries to Anchor-Hocking are, and that in the future sales to other

large industrial consumers will be, intrastate in nature. [fol. 263] This is predicated largely upon the fact that gas is diverted at low pressures from the main line high-pressure supply into lateral and branch lines in such manner that the diverted gas cannot be restored to the high pressure main line flow. They say that the continuity of movement is broken; that the gas is segregated for a particular intrastate use or uses and they apply to the "broken package" rule to make such sales to Anchor-Hocking intrastate in character. There are cases which apply the "broken package" doctrine to situations not entirely dissimilar and which lend support to appellants' contention. *East Ohio Gas Co. v. Tax Commission* (1931), 283 U. S. 465, 75 L. Ed. 1171, 1175; *Southern Natural Gas Corp. v. Alabama* (1937), 301 U. S. 148, 81 L. Ed. 970, 974-5; *Mississippi River Fuel Corp. v. Smith* (Mo. 1942), 164 S. W. (2d) 370, 375.

However, it is now well established that sales and deliveries from interstate pipe lines to local utilities for resale are interstate transactions. *Natural Gas Act*, § 15 U. S. C. A., Sec. 717 (b); *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, *supra*; *Public Utilities Commission v. Landon*, *supra*; *State Corporation Commission v. Wichita Gas Co.* (1934), 290 U. S. 561, 563, 78 L. Ed. 500, 502. Such sales and deliveries are, so far as segregation and reduced pressures are concerned, almost exactly like sales direct to large industrial consumers. For example, gas for Anchor-Hocking and gas for the Indiana-Ohio Company, the distributing utility serving the City of Winchester, and other towns thereabout, leave the main line through the same lateral and at identical pressures. In fact [fol. 264] they are inseparably a part of the same flow. This common flow continues until the lateral divides close to points of delivery to Anchor-Hocking and the Indiana-Ohio Company. As has already been shown, the pressures there, while not exactly the same to each, are substantially the same. If the segregation and reduced pressure for delivery to the Indiana-Ohio Company do not make such transactions intrastate commerce under the "broken package" theory, we cannot very consistently apply the "broken package" theory to almost identical deliveries to Anchor-Hocking.

But we need not decide whether the Anchor-Hocking business and prospective sales direct to other large indus-

trial consumers are interstate or intrastate by mechanical standards. Even if they are interstate they still may be subject to state regulation under some circumstances. It has long been established that the power of Congress over interstate commerce is not exclusive. If the Federal Government has not elected to exercise its power under the commerce clause, and if the transaction is not of such nature as to require uniform regulation on a national basis, and if it is so local in its nature and implications that local needs outweigh national interest then, even though interstate, according to mechanical tests, the state may intervene and regulate. *Minnesota Rate Cases* (1913), 230 U. S. 352, 399, 402, 57 L. Ed. 1511, 1541, 1542; *South Carolina State Highway Dept. v. Barnwell Bros.* (1938), 303 U. S. 177, 185, 82 L. Ed. 734; *Parker v. Brown* (1943), 317 U. S. [fol. 265] 341, 359-363, 87 L. Ed. 315; *Cloverleaf Butter Co. v. Patterson* (1942), 315 U. S. 148, 155, 86 L. Ed. 754; *Southern Pacific Co. v. State of Arizona* (1945), 325 U. S. 761, 766, 89 L. Ed. 1915; *Kelly v. Washington* (1937), 302 U. S. 1, 10, 82 L. Ed. 3.

In the *Minnesota Rate Cases*, *supra*, the question of the conflicting claims of the State and the Federal Government, with reference to interstate commerce regulations, arose. Mr. Justice Hughes, in commenting upon this conflict, said, on p. 399:

" . . . It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation." (Citing many authorities.)

Following this language, the opinion states several things affecting interstate commerce (not involved in the case before us) which the states have no right to do and then on page 402 the court used the following language:

"But with these limitations there necessarily remains to the states until Congress acts, a wide range [fol. 266] for the permissible exercise of power ap-

appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. . . . Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to [fol. 267] interstate commerce as to be within the reach of the Federal Power. . . .

In *Cloverleaf-Butter Co. v. Patterson*, *supra*, the right of the state to act with reference to interstate commerce is stated in the following words, beginning near the bottom of page 155 of 315 U. S.:

" . . . It has long been recognized that in those fields of commerce where national uniformity is not essential, either the state or federal government may act. *Willson v. Black Bird Creek Marsh Co.* 2 Pet. (US) 245, 7 L. ed. 412; *California v. Thompson*, 313 US 109, 114, 85 L. ed. 1219, 1221, 61 S Ct. 930. Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. But where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation be-

comes inoperative and the federal legislation exclusive in its application."

These cases, and the language which we have quoted from them establish that a state may interfere with interstate commerce under some circumstances and indicate those circumstances to be much as we have set them forth above.

The cases cited show a substantial abandonment of the [fol. 268] mechanical test of when and where interstate commerce ends and intrastate commerce begins and test the right of states to regulate and tax local phases of interstate commerce by recognizing conflicting state and federal interests and attempting to compose and accommodate and adjust the competing demands that are inherent in our dual form of government. *United States v. South Eastern Underwriters Association* (1944), 322 U. S. 533, 546, 547, 88 L. Ed. 1440. And the trend of the later cases is as stated in *Prudential v. Benjamin* (1946) 90 L. Ed. (Adv. Op.) 1023, 1030, 1031. In that case the broadening of the field of federal intervention in interstate commerce was discussed and then the following language was used at page 1030:

" . . . the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce, and to doing so by a new, or renewed, emphasis on facts and practical considerations rather than dogmatic logistic. . . ."

Under the language and holdings of the cases above cited and quoted, the circumstances of the case before us seem to permit state regulations of sales direct from interstate pipe lines to Indiana consumers. In reaching this conclusion we find the first prerequisite of state control, i. e. that the federal government has not undertaken to regulate such business. No regulation of interstate natural gas pipe lines and distribution by and through same was attempted [fol. 269] by the federal government until Congress passed the Natural Act in 1938. 15 U. S. C. A. Sec. 717, et seq. By the Natural Gas Act, Sec. 1 (b), Congress limited the application of the Act by the following language:

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce,

to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." (Our italics.)

It will be seen that the only sales of natural gas subject to the statute are those for resale. Specifically it does not apply to any other sales, which definitely excludes from its operation direct sales to large industries for their own consumption. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (1945), 324 U. S. 635, 646, 89 L. Ed. 1241; *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 U. S. 581, 588, 89 L. Ed. 1206.

The statute followed the decided cases. The Supreme Court had held that states could not regulate the sale of natural gas from interstate pipe lines to local utilities for resale and distribution through local distribution systems. [fol. 270] *Missouri ex rel. Barrett v. Kansas Natural Gas Co., supra*; *State Corp. Commission v. Wichita Gas Co., supra*.

Likewise, it had been established that the states did have jurisdiction over sales by local distributing companies, even though the gas had come directly from interstate pipe lines. *Public Utilities Comm. v. Landon, supra*; *Pennsylvania Gas Co. v. Public Service Commission* (1919), 252 U. S. 23, 64 L. Ed. 434.

The statute, therefore, served to affirm and implement the rights of control, which the cases had already established. That this was the intent of Congress is shown by the legislative history of the statute. *Public Utilities Commission of Ohio v. United Fuel Gas Co., supra*; *Illinois Natural Gas Co. v. Central Illinois Public Service Co.* (1942), 314 U. S. 498, 506, 507, 86 L. Ed. 371; *Colorado Interstate Gas Co. v. Federal Power Commission* (1944), 324 U. S. 581, 600, 601, 89 L. Ed. 1206; *Federal Power Commission v. Hope Natural Gas Co.* (1943), 320 U. S. 591, 609, 610, 88 L. Ed. 333.

Referring to the legislative history of the act, and speaking of the scheme of the regulation intended by the Natural

Gas Act, the Supreme Court said, in *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, *supra*, at page 467:

"It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power [fol. 271] Commission would exercise jurisdiction over matters in interstate and foreign commerce, *to the extent defined in the Act*, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong. 2d Sess. pp. 1-3; H. Rep. No. 709, 75th Cong. 1st Sess. pp. 1-4; Sen. Rep. No. 1162, 75th Cong. 1st Sess." (Our italics).

Inferentially this means that those transactions over which jurisdiction was not given to the Federal Power Commission may be considered as local matters and left to state regulatory bodies. And again we remember that among transactions not included in the act are direct sales to large industrial consumers.

Report No. 709, 75th Cong., 1st Sess., referred to in the quotation from the *United Fuel Gas Co.* case, reads as follows:

" . . . If enacted, the present bill would for the first time provide for the regulation of natural-gas companies transporting and selling natural gas in interstate commerce. It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce; and the sale [fol. 272] in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of Congressional prohibition subject to State regulation. (See *Pennsylvania Gas*

Co. v. Public Service Commission (1920), 252 U. S. 23). *There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction.* However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri v. Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Service Commission v. Attleboro Steam & Electric Co.* (1927), 273 U. S. 83). The basic purpose of the present legislation is to occupy this field in which the [fol. 273] Supreme Court has held that the States may not act. . . .” (Our italics).

This language of the report clearly indicates the intent of Congress. It clearly indicates that the only sales to be regulated under the provisions of the bill were sales to local distributing utilities for resale. Failure to include sales direct to large industrial consumers indicates the thought upon the part of Congress that uniformity is not required in such sales and that they are so local in nature as properly to be left to state regulation.

We seem to have all the prerequisites to state intervention. Congress has not elected to exercise its power under the commerce clause. Uniformity in control of direct sales from interstate pipe lines to large industrial consumers does not seem to be necessary. There is nothing in the record to indicate that it is. Conditions will differ from area to area and the varying needs will be met by varying procedures. Furthermore, the fact that there has been no uniformity, so far as the record shows, up to this time, and the additional fact that Congress rather deliberately left regulation of such sales out of its regulatory scheme are also indicative that uniformity is not necessary, or at least that Congress did not believe it to be necessary after investigation and reports by the Federal Trade Commission and hearings upon the bill, in which we may assume that the pertinent facts, with reference to character of regulation needed, were developed. It would also seem that [fol. 274] Congress did not believe the national interest in the regulation of such business outweighed local needs,

and the logic of the situation seems to support such position. The State of Indiana, in its scheme of utility regulation, controls sales to all other consumers of gas brought into Indiana through interstate pipe lines. The sales by local distribution utilities are regulated by the state. The record shows that many industrial consumers are thus provided with natural gas derived from exactly the same source. If sales to some are regulated by the State and others are free from regulation confusion is natural.

Also if Indiana may not regulate the sale of natural gas from interstate pipe lines direct to large industrial consumers in Indiana, such sales and deliveries will not be regulated at all under present law. The result will not only be that the pipe line owners, free of regulation, will have advantage over regulated local utilities in competing for business from large industrial consumers, but the customers of the pipe line may be given advantage over the customers of the local utilities. Local utilities whose costs per unit of gas have been increased by the reduced volume of sales caused by the direct deliveries from the pipe lines will be entitled to higher rates and resulting price disparity unfavorable to customers of the local utilities will tend to break down the state system of regulation which will have fixed, and appear to be responsible for, the unfavorable local rates. This probable result, it seems to us, [fol. 275] is a weighty consideration in balancing national interest against local need.

While the exact question now before this court has never been decided by the Supreme Court of the United States, cases have been cited which seem to us to be persuasive.

In the cases of *Public Utilities Co. v. Landon*, *supra*, *Pennsylvania Gas Co. v. Public Service Commission*, *supra*, *East Ohio Gas Co. v. Tax Commission*, *supra*, and *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, *supra*, deliveries of natural gas to consumers were held to be so local in nature as to permit state regulation and control.

The *Landon* case, the *Pennsylvania Gas Company* case and the *East Ohio Gas Company* case all held that gas taken from interstate pipe lines and delivered to consumers was subject to state regulation. It is true that these cases all involve sales in municipalities but the fact remains that the gas was all interstate gas and flowed directly from the points where captured through interstate pipe lines and distribution systems to consumers. In the *Landon* case

service to consumers was not directly from the pipe line. There was an intervening distributing company. But in the other two cases gas was supplied to consumers by the pipe line company using distribution systems owned by it directly from sources outside the state. In all three cases the business was held to be so local in nature as to permit state interference by taxation or regulation. The Supreme [fol. 276] Court, in later cases, seems to us to have indicated that the result in the Pennsylvania Gas Co. case was predicated largely upon the fact that the sales involved were to consumers. *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, p. 505, *supra*, *Jersey Central Power & Light Co. v. Federal Power Commission* (1943), 319 U. S. 61, 80 L. Ed. 1258. In the Barrett case, which did not involve sales to consumers but to distributing companies for resale, the Landon case and the Pennsylvania Gas Company case were discussed and it was said, on page 309 of 265 U. S.:

"In both cases the things done were local, and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the Landon Case. The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state, and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance. . . ."

By this language the Supreme Court of the United States seems to us to indicate that the test is whether or not local business is involved and that supplying local consumers [fol. 277] is a local business. It does not seem to be material whether the service is by the transporting company or by an independent distributing company. In the case before us the sales are and will be to local customers for their own consumption. Therefore, paraphrasing the language quoted, the local interest is paramount and interference with interstate commerce, if any, is of minor importance and permissible.

In the case of *Southern Natural Gas Corp. v. Alabama, supra*, the validity of a franchise tax on a pipe line company was involved. The pipe line company furnished natural gas to three distributing utilities and this business was, of course, interstate under the Natural Gas Act and the decisions we have already cited. It is also distributed gas directly to one large industrial consumer. The gas to this consumer was delivered in continuous movement from out-state gas fields. The court held that the tax was valid and in doing so indicated that the sale of gas to the one industrial consumer was so local or intrastate in nature as to justify the tax, which could not be imposed if the pipe line company was engaged only in interstate commerce.

There are many other cases cited by the parties on this phase of the case which have been helpful in reaching our conclusion. We have examined all of them, but discussion of more of them would only unnecessarily further prolong this opinion.

We may add in connection with our comment on the [fol. 278] decided cases that we have had in mind that taxation by a state and the exercise of its police power are not always justified by the same facts. It very recently has been said by the Supreme Court of the United States (*Freeman v. Hewit*, decided December 16, 1946) that state taxation of local aspects of interstate commerce will be more carefully scrutinized and more consistently resisted than state regulation under the police power. After weighing the competing State and Federal interests interference with local phases of interstate commerce by regulation may be allowed when interference by taxation would not be. It is pointed out that there are always other sources from which revenue may be derived by taxation and that revenue serves as well no matter what its source, whereas, as said by the Court in the *Freeman v. Hewit* case *supra*, "A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State. *The Minnesota Rate Cases*, 230 U. S. 352, 402 et seq.; *S. C. Hwy. Dept. v. Barnwell Bros.*, 303 U. S. 177; *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 209-12."

This leniency toward the police power as compared with the taxing power of the states inures to the benefit of appellants in the case before us, not only in considering the

merits of the differences involved but in weighing the value of the decided cases as precedents.

[fol. 279] Suggestion is made by appellee, but not very vigorously urged, that it is not a public utility in its service direct to large industrial consumers in Indiana, and is, therefore, not subject to regulation in connection with such service. By the Natural Gas Act (Sec. 1 (a)) it appears that the natural gas business had been investigated by the Federal Trade Commission and reports had been made to Congress, and upon the basis of such investigation and reports Congress declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and it is traditionally accepted that any business affected with a public interest is subject to regulation and control.

We also have an Indiana statute which defines a public utility, subject to control of the Indiana Public Service Commission, to be ". . . every corporation . . . , that now or hereafter may own, operate or control any . . . plant or equipment . . . for the . . . transmission, delivery or furnishing of heat, light, water or power . . . either directly or indirectly to or for the public" Sec. 54-105 Burns' 1933.

Another Indiana Statute became law on February 26, 1945, before the orders involved in this action were made by the Indiana Public Service Commission. Acts of 1945, Chap. 53, p. 110. This act adds an additional section to the Indiana Public Service Commission Act aimed directly at the natural gas business, and by the act a "gas utility" [fol. 280] was defined to mean and include "any public utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the State of Indiana for his, its or their domestic, commercial or industrial use." Certainly appellee is selling and proposing to sell gas directly to consumers in Indiana.

The bottom question on this phase of the case is whether the appellee is furnishing gas in Indiana directly or indirectly to or for the public. Admittedly it is selling gas in Indiana indirectly to and for the public through distributing companies and that makes it a public utility under the Indiana statute, subject to regulation and control by the Indiana Public Service Commission. Also admittedly it is selling and proposing to sell gas directly to consumers within the state. This part of its business and its inter-

state transportation and its sales to local distributing utilities are so integrated that in any practical consideration of the state's right to regulate direct sales to consumers that activity must be appraised as a part of its entire business in Indiana. Its rights and duties, with reference to such direct sales, must be determined in the light of its over-all character in the State of Indiana. It will compete with local activities in soliciting industrial business and will be in position to discriminate in its service and in its rates and in its regulations. This freedom is inconsistent with all concepts of the duties and obligations of a person or corporation engaged in such business.

[fol. 281] The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. *United Fuel Gas Co. v. Railroad Commission* (1929), 278 U. S. 300, 309, 73 L. Ed. 390, 396; *Industrial Gas Co. v. Public Utilities Commission of Ohio* (1939), 135 Ohio St. 408, 21 N. E. (2d) 166, 168. From the last named case, we quote the following:

"It may well be urged that a corporation, calculated to compete with public utilities and take away business from them, should be under like regulatory restriction if effective governmental supervision is to be maintained. Actual or potential competition with other corporations whose business is clothed with a public interest is a factor to be considered; otherwise corporations could be organized to operate like appellant and in competition with bona fide utilities until the whole state would be honey-combed with them and public regulation would become a sham and delusion.

"What appellant seeks to do is to pick out certain industrial consumers in select territory and serve them under special contracts to the exclusion of all others except such private or domestic consumers as may suit [fol. 282] its convenience and advantage. There were other industrial consumers with whom the appellant refused or failed to agree and so did not serve them. If such consumers were served at all, it must necessarily be by a competitor. If a business so carried on

may escape public regulation then there would seem to be no valid reason why appellant may not extend the service to double, triple or many times the number now served without being amenable to regulative measures."

The law, as declared in *Industrial Gas Company v. Public Utilities Commission of Ohio*, *supra*, seems to us fair, reasonable and logical and, when applied to the facts in the case before us, leaves appellee unquestionably in the position of a public utility subject to regulation.

The same thought which was behind the Ohio case, just cited and quoted, with which thought we agree, was also incorporated in *Re Potter Development Co.* (1939), 32 P. U. R., N.S. 45, decided by the Public Service Commission of New York. In that case, the Potter Company sold natural gas to the Corning Glass Works. The Potter Company obtained its gas from an interstate transmission line and piped it to the Corning Glass Works, which is located in the City of Corning, New York. The Glass Works was the only customer served by the Potter Company, but the interstate pipe line also furnished gas to an affiliate which, as a public utility, operated the gas distribution system in the City of [fol.283] Corning. There was a proceeding to determine whether the Potter Company was a public utility subject to regulation by the New York Public Service Commission. The Commission held that it was, and, in support of its holding, argued that to hold otherwise would invite widespread circumvention of the Public Service law and would result in a multitude of companies supplying gas under special contracts in competition with public utilities and indicated that such a situation would be intolerable.

Reversed with instructions to enter judgment denying plaintiff the relief sought.

Emmert, J., not participating.

[fol. 284] And afterwards, to-wit: On the 21st day of February 1947, the same being the 77th day of the November Term, 1946, the following proceeding was had in said cause. Come now the appellees by counsel and file a petition with briefs (9) thereon for a rehearing in the above entitled appeal, together with proof of service of a copy of petition and brief on opposing counsel, which petition is in the words and figures following, to-wit: (H. I.)

And afterwards, to-wit: On the 28th day of February 1947, the same being the 83rd day of the November Term, 1946, the following proceeding was had in said cause.

Comes now the Corporate Appellants and files separate brief in opposition to petition for rehearing and proof of service, which brief is in the words and figures following, to-wit: (H. I.).

And afterwards, to-wit: On the 1st day of March 1947 the same being the 84th day of the November Term, 1946, the following proceeding was had in said cause.

Comes now the appellants and files a memorandum opposing petition for rehearing (9) and proof of service which memorandum is in the words and figures following, to-wit: (H. I.).

[fol. 285]

[File endorsement omitted]

IN THE SUPREME COURT OF INDIANA

[Title omitted]

APPELLEE'S PETITION FOR REHEARING—Filed February 21,
1947

Comes now Panhandle Eastern Pipe Line Company, appellee in the above entitled cause and requests that a rehearing of this cause be granted, that the opinion and judgment of this Court heretofore rendered be set aside and vacated, and that the judgment of the Randolph Circuit Court be affirmed, and as grounds therefor says that the decision of this Court in said cause is erroneous in each of the following respects, and for each of the following reasons:

1. That the Court erred in reversing the judgment of the Randolph Circuit Court.

2. That the Court erred in holding that the price charged by appellee for the sale and delivery of natural gas transported in interstate commerce to Anchor-Hocking and DuPont under individual contracts under the uncontroverted facts in this record with reference to such sales and deliveries is subject to regulation by the State of Indiana by and through the appellant, The Public Service Commission of Indiana.

3. That the Court erred in failing to hold that Article I, Section 8 (3) of the Constitution of the United States of its own force precludes the State of Indiana by or through appellant, The Public Service Commission of Indiana, or otherwise, from regulating or fixing the price at which natural gas transported into Indiana from Kansas and Texas may be sold and delivered to Anchor-Hocking Glass Company and E. I. DuPont DeNemours Company under individual contracts under the uncontroverted facts in the record in this case with reference to the character of such sales and deliveries.

4. That the Court erred in sustaining the order of appellant, The Public Service Commission of Indiana, construed by the opinion of this Court as an unequivocal assertion of the power and jurisdiction of said Commission to regulate and fix rates upon sales of natural gas from appellee's interstate pipe line direct to large industrial consumers of gas in Indiana, under the facts disclosed by the record in this case with reference to the character of such sales and deliveries as against appellee's contention that such regulation is precluded by Article I, Section 8 (3) of the Constitution of the United States.

5. That the Court erred in failing to hold that Article I, Section 8 (3) of the Constitution of the United States of its own force precludes the State of Indiana by or through appellant, The Public Service Commission of Indiana from [fol. 287] regulating either the rates at which natural gas transported into Indiana in interstate commerce may be sold and delivered to the Anchor-Hocking and DuPont Companies under the facts disclosed by the record in this case or the service in making sales and deliveries in interstate commerce directly to such industrial consumers.

6. That the Court erred in holding that direct sales and deliveries of natural gas transported in interstate commerce to large industrial consumers under individual contracts under the facts disclosed by the record in this case, constitute local matters subject to state regulation either as to the rates charged therefor or as to the services rendered.

7. That the Court erred in inferring either from the language of the Federal Natural Gas Act or the Committee Re-

ports preceding its enactment, that direct sales to large industrial consumers of natural gas transported in interstate commerce under individual contracts were or are considered by Congress local matters properly left to state regulatory bodies.

8. That the Court erred in holding that the failure of Congress to include in the Federal Natural Gas Act authority of the Federal Power Commission to regulate the rates for direct sales and deliveries to industrial consumers indicates a thought or belief of Congress that uniformity of regulation of such sales is not required and that they are so local in character as to be properly left to state regulation.

9. That the Court erred in holding that the relative national or local importance of appellee's business of selling [fol. 288] direct to industrial consumers natural gas transported in interstate commerce can properly be ascertained by inferring from Committee Reports in connection with the passage of the Natural Gas Act reasons unexpressed in such legislation for the failure of Congress to provide for federal regulation of such sales.

10. That the Court erred in holding that the thought or belief of Congress not embodied in actual legislation but inferred as a reason for its failure to enact legislation can remove the protection of the Commerce Clause from the business of selling and delivering natural gas transported in interstate commerce direct to large industrial consumers under individual contracts.

11. That the Court erred in holding that uniformity in the control of direct sales from interstate pipelines to large industrial consumers is not necessary if governmental regulation of any character is to be imposed.

12. That the Court erred in failing to hold that uniformity in governmental regulation of direct sales of natural gas transported in interstate commerce from interstate pipelines to large industrial consumers is necessary in the constitutional sense and that if governmental regulation of any character is to be imposed such necessity requires that uniform regulation be prescribed by a single authority.

13. That the Court erred in holding that the fact that Congress left regulation of direct sales to large industrial

[fol. 289] consumers of natural gas transported in interstate commerce out of its regulatory scheme as embodied in the Federal Natural Gas Act, establishes that uniform regulation is not necessary if governmental regulation is to be imposed or that Congress did not believe such uniformity to be necessary.

14. That the Court erred in holding that the Federal Natural Gas Act and the Committee Reports in connection with the enactment thereof, separately or collectively indicate a belief of Congress that the national interest in the regulation of the business of direct sales to large industrial consumers of natural gas transported in interstate commerce is outweighed by local matters or establish that national interest therein is subordinate to local interest.

15. That the Court erred in holding that any local interest of the state in protecting its local distributing companies from competition with direct sales of natural gas transported in interstate commerce to large industrial consumers constitutes a local interest justifying local regulation of such business.

16. That the Court erred in holding that competitive advantages of a pipeline company engaged in interstate commerce can be properly neutralized by local regulation for the purpose of protecting local competitors or their customers from the consequences of such advantages.

17. That the Court erred in holding that all sales and deliveries of natural gas in interstate commerce are of paramount local importance and subject to local regulation if such sales are for consumption by the purchaser rather than for resale.

[fol. 290] 18. That the Court erred in holding that the character of the business of transporting and selling natural gas in interstate commerce as local or national is properly determined by the use to which the buyer of the commodity intends to put it.

19. That the Court erred in holding that direct sales to industrial consumers of natural gas transported in interstate commerce are subject to state regulation because of paramount local interest.

20. That the Court erred in holding that the regulation of the price to be paid or received for natural gas trans-

ported in interstate commerce and delivered direct to large industrial consumers is a regulation of a local phase or aspect of interstate commerce.

21. That the Court erred in holding that by reason of the sales of gas in interstate commerce to local distributing companies appellee is a public utility subject to regulation and control by the appellant, The Public Service Commission of Indiana.

22. That the Court erred in holding that appellee in its service direct to large industrial consumers of natural gas transported in interstate commerce is a public utility subject to the jurisdiction of the appellant, The Public Service Commission of Indiana either because of its integration of such sales and its sales to local distributing companies or otherwise.

23. That the Court erred in holding that the State of Indiana by mere statutory definition of a specific business [fol. 291] as a public utility can extend its regulatory jurisdiction to include either appellee's sale to local distributing companies in Indiana or its direct sales and deliveries under individual contracts to large industrial consumers of natural gas transported in interstate commerce and in thereby denying to appellee the protection of Article I, Section 8 (3) of the Constitution of the United States.

24. That the Court erred in holding that in selling and delivering directly to large industrial consumers natural gas transported in interstate commerce appellee is not free to pick and choose its customers but may be required by the State of Indiana or The Public Service Commission of Indiana to serve all those who desire such service and in thereby denying to appellee the protection of Article I, Section 8 (3) of the Constitution of the United States.

25. That the Court erred in holding that Section 54-105 Burns' Ind. Stat. 1933 or any other section of the Statutes of Indiana applicable to public utilities may be validly applied to appellee or any portion of the business it transacts in Indiana over appellee's objection that such application is in violation of Article I, Section 8 (3) of the Constitution of the United States.

26. That the Court erred in holding that Chapter 53 of the Acts of the General Assembly of 1945 may be validly

applied to appellee or any portion of the business which it transacts in Indiana over appellee's objection that such application is in violation of Article I, Section 8 (3) of the Constitution of the United States.

[fol. 292] 27. That the Court erred in failing to hold that the order of appellant, ~~The Public Service Commission of~~ Indiana asserting power and jurisdiction to regulate rates, and prescribe terms of service for the sale and delivery by appellee of natural gas transported in interstate commerce directly to Anchor-Hocking and DuPont under individual contracts directly and unlawfully burdens interstate commerce in violation of Article I, Section 8 (3) of the Constitution of the United States.

28. That the judgment and decision of this Court sustaining the order of the appellant, The Public Service Commission of Indiana, imposes a direct and unlawful burden on interstate commerce in violation of Article I, Section 8 (3) of the Constitution of the United States.

Wherefore the above named appellee prays that a rehearing of this cause be granted, that the opinion and judgment of this Court heretofore rendered be set aside and vacated and that the judgment of the Randolph Circuit Court be affirmed.

William R. Hunter, George M. Beame, Alan W. Boyd,
Attorneys for Appellee.

[fol. 293]

[Title omitted]

APPELLANTS' ACKNOWLEDGMENT OF SERVICE OF APPELLEE'S
PETITION FOR REHEARING AND BRIEF AND RECEIPT OF
COPIES THEREOF

Service of the above and foregoing petition for rehearing, together with appellee's brief in support thereof and receipt of copies of the same this 21st day of February, 1947 are hereby acknowledged.

— —, Attorney General of Indiana, Attorney
for Appellant, The Public Service Commission of
Indiana. — —, Attorneys for Appellants, In-
diana Gas & Water Company, et al.

[fol. 294] IN SUPREME COURT OF INDIANA

ORDER DENYING PETITION FOR REHEARING—March 25, 1947

Come now the parties by counsel and the court, being advised in the premises, denies the appellee's petition for rehearing heretofore filed herein, which petition is in the words and figures following, to-wit: (H. I.).

And afterwards, to-wit: On the 25th day of March 1947, the same being the 104th day of the November Term, 1946, the further following proceedings were had in said cause.

Comes now the appellees and files the following:

Appellee's petition for appeal to the United States Supreme Court;

Assignment of Errors;

Statement as to Jurisdiction of appeal;

Order allowing appeal, signed by Frank E. Gilkison, C. J.;

Appeal Bond;

Citation and proof of service;

Notice of allowance of appeal and proof of service;

Stipulation for Transcript.

[fol. 295] IN THE SUPREME COURT OF INDIANA

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA TO THE SUPREME COURT OF THE UNITED STATES

To the Chief Justice of the Supreme Court of the State of Indiana:

Panhandle Eastern Pipe Line Company, your petitioner, respectfully shows:

1. Petitioner is the appellee-appellant in the above-entitled cause.

2. The above-named appellee-appellant filed a complaint in the Randolph Circuit Court of the State of Indiana on the eleventh day of January, 1946, for an order and judg-

[fol. 296] ment setting aside and vacating an order of appellant-appellee, The Public Service Commission of Indiana, and enjoining the enforcement thereof, and judgment was entered for your petitioner.

3. On appeal from said judgment to the Supreme Court of the State of Indiana, the same was reversed on the fifth day of February, 1947, and thereafter, within the time allowed by law, your petitioner applied for a rehearing, which was denied by said court on the 25 day of March, 1947.

4. In said cause there is drawn in question the validity of certain statutes of the State of Indiana, on the ground of their being repugnant to the Constitution of the United States, and the decision is in favor of their validity in that (1) an order and supplemental order issued by The Public Service Commission of Indiana, asserting and exercising jurisdiction and authority to regulate rates and service for your petitioner's interstate sales of natural gas transported by pipe line from Texas and Kansas and delivered in Indiana directly to large industrial consumers was sustained as against your petitioner's timely objection that said order and supplemental order were invalid by reason of Article I, Section 8(3) of the Constitution of the United States, and (2) the various provisions of the Public Service Commission Act of Indiana (Burns' Indiana Statutes Annotated, 1933, Sections 54-101, et seq.) were held applicable to [fol. 296-a] your petitioner's business of selling and delivering to large industrial consumers in Indiana natural gas transported by interstate pipe line from Texas and Kansas as against your petitioner's timely objection that such application violated Article I, Section 8(3) of the Constitution of the United States.

Wherefore, petitioner prays for the allowance of an appeal from said Supreme Court of the State of Indiana to the Supreme Court of the United States, in order that the decision of the Supreme Court of the State of Indiana may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of Indiana, may be sent to the Supreme Court of the United States as provided by law.

Petitioner, desiring the appeal to be a supersedeas, prays an order touching the security to be required of it, and the approval of such bond as required in this case.

The errors upon which your petitioner claims to be entitled to an appeal are those above indicated and more fully set forth in the assignment of errors filed herewith.

Dated March 25, 1947.

(S) Alan W. Boyd, John S. Li Yost, Samuel H. Riggs, Attorneys for Panhandle Eastern Pipe Line Company, Appellee-Appellant.

[fol. 297] IN THE SUPREME COURT OF INDIANA

[Title omitted]

ASSIGNMENT OF ERRORS

In support of its petition for appeal to the Supreme Court of the United States in the above-entitled cause, Panhandle Eastern Pipe Line Company, appellee-appellant, assigns the following errors in the record and proceedings in said cause:

1. The Supreme Court of Indiana erred in holding valid, as against the contention of appellee-appellant that the same are repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States, the order of the Public Service Commission of Indiana issued on November 21, 1945, and its order supplemental thereto issued April 9, [fol. 298] 1946, said orders being construed by the Supreme Court of Indiana as an unequivocal assertion of the power and jurisdiction of said Commission to regulate interstate sales and deliveries of natural gas by appellee-appellant to large industrial consumers of gas in Indiana, including the fixing of rates therefor, under the facts disclosed by the record in this case with reference to the character of such sales and deliveries.

2. The Supreme Court of Indiana erred in holding valid the application of the Public Service Commission Act of Indiana and, particularly, the section thereof defining a public utility subject to regulation by the Indiana Public Service Commission, codified as Section 54-105, Burns' Indiana Statutes Annotated, 1933, Volume 10, page 335, to appellee-appellant's business of selling and delivering to large industrial consumers in Indiana natural gas transported in interstate commerce under the facts disclosed in

this case with reference to the character of such sales and deliveries, as against the contention of appellee-appellant that the same, as applied to its business in Indiana, is repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States.

3. The Supreme Court of Indiana erred in failing to hold that Article I, Section 8, Clause 3, of the Constitution of the United States of its own force precludes the State of Indiana, by or through the Public Service Commission of Indiana or otherwise, from regulating or fixing the price at which natural gas transported into Indiana from Kansas and Texas may be sold and delivered by appellee-appellant to Anchor-Hocking Glass Company and E. I. DuPont [fol. 299] de Nemours Company, pursuant to special, private, individual contracts, under the uncontroverted facts in the record in this case with reference to the character of such sales and deliveries.

4. The Supreme Court of Indiana erred in holding that the price charged by appellee-appellant for natural gas sold and delivered in interstate commerce to Anchor-Hocking Glass Company and to E. I. DuPont de Nemours Company, pursuant to special, private, individual contracts, under the uncontroverted facts in this record with reference to such sales and deliveries, is subject to regulation by the State of Indiana by and through the Public Service Commission of Indiana.

5. The Supreme Court of Indiana erred in holding that direct sales and deliveries of natural gas transported in interstate commerce to large industrial consumers pursuant to special, private, individual contracts, under the facts disclosed by the record in this case, constitute local matters subject to state regulation either as to the rates charged therefor or as to the services rendered.

6. The Supreme Court of Indiana erred in inferring either from the language of the Federal Natural Gas Act or the Committee Reports preceding its enactment, that direct sales to large industrial consumers of natural gas transported in interstate commerce pursuant to special, private, individual contracts were or are considered by Congress local matters properly left to state regulatory bodies.

[fol. 300] 7. The Supreme Court of Indiana erred in holding that the failure of Congress to include in the Federal Natural Gas Act authority of the Federal Power Commission to regulate the rates for direct sales and deliveries to industrial consumers indicates a thought or belief of Congress that uniformity of regulation of such sales is not required and that they are so local in character as to be properly left to state regulation.

8. The Supreme Court of Indiana erred in holding that the relative national or local importance of appellee-appellant's business of selling direct to industrial consumers natural gas transported in interstate commerce can properly be ascertained by inferring from Committee Reports in connection with the passage of the Natural Gas Act reasons unexpressed in such legislation for the failure of Congress to provide for federal regulation of such sales.

9. The Supreme Court of Indiana erred in holding that the thought or belief of Congress, not embodied in actual legislation but inferred as a reason for its failure to enact legislation, has removed or can remove the protection of the Commerce Clause from the business of selling and delivering natural gas transported in interstate commerce direct to large industrial consumers under individual contracts.

10. The Supreme Court of Indiana erred in failing to hold that uniformity in governmental regulation of direct sales of natural gas transported in interstate commerce [fol. 301] from the interstate pipe lines to large industrial consumers is necessary in the constitutional as well as the practical sense and that, if governmental regulation of any character is to be imposed, such necessity requires that uniform regulation be prescribed by a single authority.

11. The Supreme Court of Indiana erred in holding that there was "nothing in the record to indicate" that "uniformity in control of direct sales from interstate pipe lines to large industrial consumers" is necessary, thus ignoring the uncontroverted testimony of witness O. W. Morton establishing that such uniformity is necessary so far as the regulation of service is concerned.

12. The Supreme Court of Indiana erred in holding that the fact that Congress left regulation of direct sales to

large industrial consumers of natural gas transported in interstate commerce out of its regulatory scheme as embodied in the Federal Natural Gas Act, establishes that uniform regulation is not necessary if governmental regulation is to be imposed or ~~that~~ Congress did not believe such uniformity to be necessary.

13. The Supreme Court of Indiana erred in holding that the Federal Natural Gas Act and the Committee Reports in connection with the enactment thereof, separately or collectively, indicate a belief of Congress that the national interest in the regulation of the business of direct sales to large industrial consumers of natural gas transported in interstate commerce is outweighed by local matters or establish that national interest therein is subordinate to local interest.

[fol. 302]. 14. The Supreme Court of Indiana erred in holding that any local interest of the state in protecting its local distributing companies from competition with direct sales of natural gas transported and sold in interstate commerce to large industrial consumers, constitutes a local interest justifying local regulation of such interstate business.

15. The Supreme Court of Indiana erred in holding that competitive advantages of a pipe line company engaged in interstate commerce can be properly neutralized by local regulation for the purpose of protecting local competitors or their customers from the consequences of such advantages.

16. The Supreme Court of Indiana erred in holding that all sales and deliveries of natural gas in interstate commerce are of paramount local importance and subject to local regulation if such sales are for consumption by the purchaser rather than for resale.

17. The Supreme Court of Indiana erred in holding that the nature and classification of the business of transporting and selling natural gas in interstate commerce as local or national is properly determined by the use to which the buyer of the commodity intends to put it.

18. The Supreme Court of Indiana erred in holding that the regulation of the price to be paid or received for natural gas transported in interstate commerce and delivered to

large industrial consumers whose manufactured products are distributed primarily in interstate commerce, as shown by the evidence in this case, is a regulation of a local phase or aspect of interstate commerce.

[fol. 303] 19. The Supreme Court of Indiana erred in holding that, by reason of its sales of gas in interstate commerce to local distributing companies, appellee-appellant is a public utility subject to regulation and control by the Public Service Commission of Indiana.

20. The Supreme Court of Indiana erred in holding that appellee-appellant, in its service direct to large industrial consumers of natural gas transported in interstate commerce, is a public utility subject to the jurisdiction of the Public Service Commission of Indiana, either because of its integration of such sales and its sales to local distributing companies or otherwise.

21. The Supreme Court of Indiana erred in holding that the State of Indiana, by mere statutory definition of a specific business as a public utility, can extend its regulatory jurisdiction to include either appellee-appellant's interstate sales to local distributing companies in Indiana or its interstate direct sales and deliveries under special, private, individual contracts to large industrial consumers of natural gas; thereby denying to appellee-appellant the protection of Article I, Section 8, Clause 3, of the Constitution of the United States.

22. The Supreme Court of Indiana erred in holding that, in selling and delivering directly to large industrial consumers natural gas transported in interstate commerce, appellee-appellant is not free to pick and choose its customers but may be required by the State of Indiana or the Public Service Commission of Indiana to serve all those [fol. 304] who desire such service; thereby denying to appellee-appellant the protection of Article I, Section 8, Clause 3, of the Constitution of the United States.

23. The Supreme Court of Indiana erred in holding that Section 54-105, Burns' Indiana Statutes Annotated, 1933, or any other section of the Statutes of Indiana applicable to public utilities may be validly applied to appellee-appellant or any portion of the business it transacts in Indiana, over its objections that such application is repugnant to

Article I, Section 8, Clause 3, of the Constitution of the United States.

24. The Supreme Court of Indiana erred in holding that Chapter 53 of the Acts of the General Assembly of Indiana of 1945, codified as Section 54-601A of Burns' Indiana Statutes Annotated, 1945 Supp., may be validly applied to appellee-appellant or any portion of the business which it transacts in Indiana over its objection that such application is repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States.

25. The Supreme Court of Indiana erred in failing to hold that the orders of the appellant-appellee, The Public Service Commission of Indiana, asserting power and jurisdiction to regulate rates, and to prescribe terms of service, for the sale and delivery by appellee-appellant of natural gas transported in interstate commerce directly to Anchor-Hocking Glass Company and E. I. DuPont de Nemours Company under special private, individual contracts, directly and unlawfully burdens interstate commerce in [fol. 305] violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

Wherefore, Panhandle Eastern Pipe Line Company prays that the errors assigned above be reviewed and corrected by the Supreme Court of the United States and that the judgment entered in this case by the Supreme Court of Indiana be reversed and a judgment rendered in favor of appellee-appellant.

Dated at Indianapolis, Indiana, this 25 day of March, 1947.

(S) Alan W. Boyd, John S. L. Yost, Samuel H. Riggs, Attorneys for Panhandle Eastern Pipe Line Company, Appellee-Appellant.

[fols. 306-308] Bond on appeal for \$500.00 approved and filed March 25, 1947, omitted in printing.

[fol. 309] IN THE SUPREME COURT OF INDIANA

No. 28225

THE PUBLIC SERVICE COMMISSION OF INDIANA, LEROY E. YODER, Lawrence E. Carlson, and Lawrence W. Cannon, as Members of The Public Service Commission of Indiana, Indiana Gas & Water Company, Inc., Central Indiana Gas Company, Northern Indiana Public Service Company, Kokomo Gas & Fuel Company, Southern Indiana Gas & Electric Company, and Greenfield Gas Company, Inc., Appellants-appellees,

v.

PANHANDLE EASTERN PIPE LINE COMPANY, Appellee-Appellant

ORDER ALLOWING APPEAL

The petition of Panhandle Eastern Pipe Line Company, appellee-appellant, for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of the State of Indiana, and the assignment of errors filed therewith, and the record of said cause having been considered,

It is Ordered that an appeal be and is allowed to the Supreme Court of the United States from the Supreme Court of the State of Indiana, as prayed in said petition, and [fol. 310] that the Clerk of the Supreme Court of the State of Indiana shall prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within forty days from the date hereof. The transcript of the record and proceedings so transmitted may be either a transcript of the entire record and proceedings or such portions thereof as the parties to this cause shall designate by written stipulation filed with the Clerk of this Court and approved by this Court.

It is Further Ordered that said Panhandle Eastern Pipe Line Company shall give good and sufficient security in the sum of Five Hundred Dollars, that said appellee-appellant

shall prosecute said appeal to effect, and that if said appellee-appellant fail to make its plea good, it shall answer all damages and costs.

The said appellee-appellant now presenting a bond in the sum of Five Hundred Dollars (\$500.00), with United States Guaranty Company as surety,

It is ~~For~~ordered that the same be and is hereby approved. The appeal shall operate as a supersedeas.

Dated March 25, 1947.

(Signed) Frank E. Gilkison, Chief Justice of the Supreme Court of Indiana.

[fols. 311-312] Citation in usual form showing service on Cleon Foust, et al., omitted in printing.

[fol. 313] IN THE SUPREME COURT OF INDIANA

[Title omitted]

STIPULATION AS TO CONTENTS OF TRANSCRIPT ON APPEAL

It is Hereby Stipulated by and Between the Parties Hereto, through their respective attorneys, and subject to the approval of the Supreme Court of Indiana by the Chief Justice thereof, that the portion of the record to be included in the transcript to be filed in the Supreme Court of the United States, pursuant to the appeal heretofore allowed herein, shall include only the following:

I. The transcript of the record certified and transmitted to the Clerk of the Supreme Court of Indiana by the Clerk [fol. 314] of the Randolph Circuit Court, including therein only the following:

A. The complaint of Panhandle Eastern Pipe Line Company filed in the Randolph Circuit Court, omitting therefrom Exhibit A thereto, which the parties stipulate and agree is identical with the printed document to be included in Exhibit 2 in the bill of exceptions containing the evidence in this cause denominated Commission Order and consisting of 86 printed pages.

B. The answer to the complaint filed in the Randolph Circuit Court by Public Service Commission of Indiana, et al.

C. The intervening petition of Indiana Gas and Water Company, Inc. It is stipulated that the intervening petitions of Central Indiana Gas Company, Northern Indiana Public Service Company, Kokomo Gas and Fuel Company, Southern Indiana Gas and Electric Company were identical with that of Indiana Gas and Water Company, Inc., and that the answers filed by said intervenors in the Randolph Circuit Court were identical with that filed by Public Service Commission of Indiana, et al.

D. The supplemental complaint filed in the Randolph Circuit Court by Panhandle Eastern Pipe Line Company.

E. The amended answer to the supplemental complaint filed in the Randolph Circuit Court by Public Service Commission of Indiana, et al.

F. The finding and judgment of the Randolph Circuit [fol. 315] Court.

G. The motions for new trial filed respectively by the Public Service Commission of Indiana and by Indiana Gas and Water Company, Inc., et al and the respective orders overruling the same.

H. The bill of exceptions containing the evidence introduced in the Randolph Circuit Court, including therefrom only the following:

(1) Exhibit No. 1 offered by Panhandle Eastern Pipe Line Company and admitted in evidence, omitting therefrom formal parts and the exhibit attached thereto, setting forth the provisions of the Articles of Incorporation of Panhandle Eastern Pipe Line Company relating to its corporate powers.

(2) Exhibit No. 2 offered by Panhandle Eastern Pipe Line Company and admitted in evidence, being the proceedings before the Public Service Commission of Indiana up to and including its order of November 21, 1945, but including therefrom only the following:

(a) The Stipulation of Facts entered into between the Public Counsellor of Indiana, Panhandle Eastern Pipe Line Company, Central Indiana Gas Company, Greenfield Gas Company, Inc., Kokomo Gas and Fuel Company, Northern Indiana Public Service Company, Public Service Company of Indiana (Indiana Gas and Water Company, Inc.,) and

Southern Indiana Gas and Electric Company, dated and [fol. 316] filed January 9, 1945, omitting therefrom all exhibits attached thereto except Exhibits C, J-1, J-2, and N-1.

(b) The Stipulation of Evidence entered into between the Public Counsellor of Indiana, Panhandle Eastern Pipe Line Company, Central Indiana Gas Company, Greenfield Gas Company, Inc., Kokomo Gas and Fuel Company, Northern Indiana Public Service Company, Public Service Company of Indiana, Inc. (Indiana Gas and Water Company, Inc.) and Southern Indiana Gas Company, dated and filed March 28, 1945, omitting all exhibits attached thereto.

(c) The entire Commission Order of the Public Service Commission of Indiana entered November 21, 1945, consisting of 86 printed pages. It is hereby stipulated that the Findings of Fact of the Public Service Commission of Indiana, appearing at pages 16 to 50, inclusive (Commission numbering), correctly summarize all of the evidence offered and introduced in the proceedings of said Commission up to and including said order except to the extent that matters not included therein are included in the stipulations filed in said proceedings herein designated.

(d) The Supplemental Stipulation of Facts.

[fol. 317] (3) The deposition of O. W. Morton, offered by Panhandle Eastern Pipe Line Company and admitted in evidence in the Randolph Circuit Court. A copy of a condensed statement thereof in narrative form, stipulated by the parties hereto to be a correct statement may be included in the transcript in lieu of the said deposition in question and answer form.

(4) Exhibit 3, offered by Panhandle Eastern Pipe Line Company and admitted in evidence in the Randolph Circuit Court.

(5) The supplemental stipulation of facts admitted in evidence in the Randolph Circuit Court.

(6) Exhibit 1, offered and admitted in evidence in the Randolph Circuit Court by the Public Service Commission of Indiana. It is stipulated that all evidence offered or introduced in the Randolph Circuit Court is designated in this stipulation for inclusion in the transcript to be filed in the Supreme Court of the United States except the

matters omitted from Exhibit 1 introduced by Panhandle Eastern Pipe Line Company hereinbefore specified in paragraph I, G, (1) hereof, and exhibit 2 hereinbefore specified in paragraph I, H, (2) hereof.

II. The Assignment of errors filed in the Supreme Court of Indiana by the Public Service Commission of Indiana, et al., omitting formal parts.

[fol. 318] III. The assignment of errors filed in the Supreme Court of Indiana by Indiana Gas and Water Company, Inc., Central Indiana Gas Company, Northern Indiana Public Service Company, Kokomo Gas & Fuel Company, Southern Indiana Gas & Electric Company, and Greenfield Gas Company, omitting formal parts.

IV. The entry in the proceedings in the Supreme Court of Indiana showing the filing of the record and assignment of errors therein on August 3, 1946.

V. The entry in the proceedings in the Supreme Court of Indiana showing the submission of this cause on August 3, 1946.

VI. The opinion of the Supreme Court of Indiana filed February 5, 1947.

VII. The judgment of the Supreme Court of Indiana entered February 5, 1947.

VIII. The entry in the proceedings of the Supreme Court of Indiana showing the filing of the petition of Panhandle Eastern Pipe Line Company for rehearing and said petition for rehearing.

IX. The order of the Supreme Court of Indiana denying the petition for rehearing of Panhandle Eastern Pipe Line Company entered March —, 1947.

X. The petition for and order allowing appeal to the Supreme Court of the United States by Panhandle Eastern Pipe Line Company filed March —, 1947.

XI. The assignment of errors filed by Panhandle Eastern Pipe Line Company March —, 1947.

[fol. 319] XII. The appeal bond of Panhandle Eastern Pipe Line Company filed March —, 1947, and the entry approving the same.

XIII. The jurisdictional statement of Panhandle Eastern Pipe Line Company under Rule 12 of the Revised Rules of the Supreme Court of the United States, together with the appendix attached thereto, filed March —, 1947.

XIV. The citation to the Public Service Commission of Indiana, et al., as appellees upon appeal to the Supreme Court of the United States filed March —, 1947.

XV. The acknowledgement of service of appeal papers specified in Rule 12 of the Revised Rules of the Supreme Court of the United States filed March —, 1947.

XVI. All statements of the appellants-appellees opposing the jurisdiction of the Supreme Court of the United States under Rule 12 of the Revised Rules of the Supreme Court of the United States.

XVII. This stipulation as to the contents of the record on appeal to the Supreme Court of the United States.

It is Further Stipulated that copies of any of the items designated herein for inclusion in the transcript may be furnished by the parties to the Clerk of this Court, together with a stipulation of the parties hereto that the same are true and correct copies of the originals on file in the office of said Clerk and may be by him certified to the Supreme Court of the United States as a part of the transcript on [fol. 320] appeal to said Court as true and correct copies, without comparison thereof with the originals. The Clerk of this Court is requested to transmit to the Clerk of the Supreme Court of the United States, Washington 13, D. C., only the matters designated herein.

The Public Service Commission of Indiana, Leroy E. Yoder, Lawrence E. Carlson, and Lawrence W. Cannon, as members of The Public Service Commission of Indiana, Appellants-Appellees by (S.) Cleon Foust, Attorney General of Indiana. Indiana Gas & Water Company, Inc., Central Indiana Gas Company, Northern Indiana Public Service Company, Kokomo Gas & Fuel Company, Southern Indiana Gas & Electric Company, Greenfield Gas Company, Inc., by (signed) W. P. Evans, Attorneys for above-named Appellants-Appellees. Panhandle Eastern Pipe Line Company, by Alan W. Boyd. (Signed) John L. S. Yost, (Signed) Samuel H. Riggs, Attorneys for Appellee-Appellant Panhandle Eastern Pipe Line Company.

The above and foregoing stipulation as to the contents of the record on appeal to the Supreme Court of the United States is hereby approved as conforming to the order heretofore entered allowing said appeal this 25th day of March, 1947.

(Signed) Frank E. Gilkison, Chief Justice of the Supreme Court of Indiana.

[fol. 321] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 322] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED ON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed April 22, 1947

Comes now the appellant in the above styled cause and adopts its assignment of errors as its statement of points to be relied on and states that the entire record in this cause, as filed in this Court, is necessary for the consideration of the foregoing points, and that the entire transcript of record as transmitted by the Clerk of the Supreme Court of Indiana should be printed by the Clerk of this Court.

John S. L. Yost, Counsel for the Appellant.

Service acknowledged this 17th day of April, 1947.

Cleon H. Foust, Attorney General of Indiana, Counsel for the appellee, The Public Service Commission of Indiana and LeRoy A. Yoder et al. as Members thereof. William P. Evans, Counsel for the Appellees other than The Public Service Commission of Indiana and LeRoy A. Yoder et al. as Members thereof.

William P. Evans, Counsel for the Appellees other than The Public Service Commission of Indiana and LeRoy A. Yoder et al as Members thereof.

[fol. 322a]

[File endorsement omitted]

[fol. 323] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—May 19, 1947

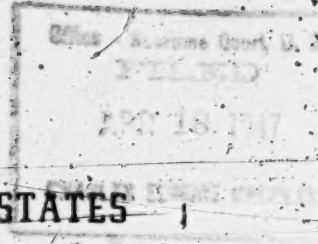
The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Douglas took no part in the consideration or decision of this question.

Endorsed on cover: Enter John S. L. Yost. File No. 52,126, Indiana, Supreme Court, Term No. 1262. Panhandle Eastern Pipe Line Company, Appellant, vs. The Public Service Commission of Indiana, et al. Filed April 18, 1947. Term No. 1262 O. T. 1946.

(1161)

FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1262 69

PANHANDLE EASTERN PIPE LINE COMPANY,

Appellant,

vs.

**THE PUBLIC SERVICE COMMISSION OF INDIANA,
ET AL.**

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

STATEMENT AS TO JURISDICTION

**ALAN W. BOYD,
JOHN S. L. YOST,
SAMUEL H. RIGGS,**
Counsel for Appellant.

INDEX

SUBJECT INDEX

	Page
Statement as to jurisdiction	1
Nature of case and statutory provisions sustaining jurisdiction	2
State statutes, the validity of which is involved	5
Date of judgment and date on which application for appeal was presented and allowed	9
Manner in which federal question was raised	10
Opinions	16
The federal questions involved are substantial	16
Appendix "A"—Opinion of the Indiana Supreme Court	24
Appendix "B"—Opinion of the Randolph Circuit Court	43
Appendix "C"—Order of the Public Service Commission of Indiana	61
Appendix "D"—Supplemental order of the Public Service Commission of Indiana	149
Appendix "E"—Applicable statutes of Indiana	162

TABLE OF CASES CITED

<i>Arkansas-Louisiana Gas Co. v. Department of Public Utilities, et al.</i> , 304 U. S. 601	22
<i>Baldwin v. Seelig</i> , 294 U. S. 511	19
<i>Buck v. Kykendall</i> , 267 U. S. 307	19
<i>Busch & Sons Co. v. Maloy</i> , 267 U. S. 317	19
<i>Charleston Federal Savings and Loan Association v. Alderson</i> , 324 U. S. 182	11
<i>Citizens Bank of Michigan City, Indiana, v. Opperman</i> , 249 U. S. 448	9
<i>Freeman v. Hewit</i> , 329 U. S. 249	18
<i>Hooven & Allison Co. v. Evatt</i> , 324 U. S. 652	20
<i>Illinois Natural Gas Co. v. Central Illinois Public Service Co.</i> , 314 U. S. 498	22
<i>King Mfg. Co. v. City of Augusta</i> , 277 U. S. 100	5
<i>Missouri ex rel. Barrett v. Kansas Natural Gas Co.</i> , 265 U. S. 298	12, 18, 19, 20, 21, 22

	Page
<i>Morgan v. Virginia</i> , 328 U. S. 373	18
<i>Northwestern Bell Telephone Co. v. Nebraska State Railway Commission</i> , 297 U. S. 471	5
<i>Panhandle Eastern Pipe Line Co. v. Federal Power Commission</i> , 324 U. S. 635	17
<i>Pennsylvania v. West Virginia</i> , 262 U. S. 553	20
<i>Pennsylvania Gas Co. v. Public Service Commission</i> , 252 U. S. 23	19
<i>Peoples Natural Gas Co. v. Public Service Commis- sion</i> , 270 U. S. 550	22
<i>Prudential Ins. Co. v. Benjamin</i> , 328 U. S. 408	21
<i>Public Utilities Commission v. Attleboro Steam & Electric Co.</i> , 273 U. S. 83, 71 L. Ed. 549	18, 19, 21
<i>Public Utilities Commission v. United Fuel Gas Co.</i> , 317 U. S. 458	22
<i>Roland Electric Co. v. Walling</i> , 326 U. S. 657, 90 L. Ed. 362	20
<i>Schollenberger v. Pennsylvania</i> , 171 U. S. 1	20
<i>Southern Pac. Co. v. Arizona</i> , 325 U. S. 761	18, 21
<i>State ex rel. Cities Service Co. v. Public Service Com- mission</i> , 85 S. W. (2d) 1890, 296 U. S. 657	22
<i>State Corp. Comm. v. Wichita Gas Co.</i> , 290 U. S. 561	13, 22
<i>U. S. v. Rock Royal Cooperative</i> , 307 U. S. 553	20
<i>Walling v. Jacksonville Paper Co.</i> , 317 U. S. 564	20
<i>Williams, Ex parte</i> , 277 U. S. 267	5
<i>Williams v. Bruffy</i> , 96 U. S. 176	5

STATUTES CITED

Section 237 of the Judicial Code, as amended, 36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. Section 344(a)	2, 5
The Public Service Commission Act of Indiana, Burns' Indiana Statutes Annotated, 1933, Vol. 10, pp. 332-407 (Ind. Acts, 1913, c. 76, pp. 167-214, as amended by: Ind. Acts, 1915, c. 110, p. 457, Ind. Acts, 1925, c. 64, p. 210; Ind. Acts, 1927, c. 146, p.	

* The abbreviation "Ind. Acts" is used to indicate the official publication entitled "Laws of the State of Indiana."

445; Ind. Acts 1933, c. 190, pp. 928-961; Ind. Acts, 1941, c. 101, pp. 255-264; Ind. Acts, 1945, c. 46, pp. 92-95 and c. 53, p. 110)	3, 5, 6, 7, 8, 9, 21
Burns' Indiana Statutes Annotated, 1933, Vol. 10:	
Section 54-105	5, 6, 7, 14, 21
Section 54-112	3, 10
Section 54-203	8
Section 54-212	8
Section 54-215	8
Section 54-216	8
Section 54-221	8
Section 54-222	8
Section 54-223	8
Section 54-313	8
Section 54-317	8
Section 54-402	9
Section 54-504	9
Section 54-505	9
Section 54-601A	5, 7
Section 54-603	8

MISCELLANEOUS

Constitution of the United States, Article I, § 8(3)	3, 10, 16
Constitution of the State of Indiana, Article VII, § 1,	
Burns' Indiana Statutes Annotated, 1933, Vol. I,	
p. 84	9

IN THE SUPREME COURT OF INDIANA

No. 28225

PANHANDLE EASTERN PIPE LINE COMPANY,

Appellant,

vs.

THE PUBLIC SERVICE COMMISSION OF INDIANA,
LEROY E. YODER, LAWRENCE E. CARLSON, AND
LAWRENCE W. CANNON, AS MEMBERS OF THE PUBLIC
SERVICE COMMISSION OF INDIANA; INDIANA GAS &
WATER COMPANY, INC., CENTRAL INDIANA GAS
COMPANY, NORTHERN INDIANA PUBLIC SERV-
ICE COMPANY, KOKOMO GAS & FUEL COMPANY,
SOUTHERN INDIANA GAS & ELECTRIC COM-
PANY, AND GREENFIELD GAS COMPANY, INC.

APPEAL FROM THE RANDOLPH CIRCUIT COURT

STATEMENT AS TO JURISDICTION ON APPEAL

In compliance with Rule 12, as amended, of the Supreme Court of the United States, Panhandle Eastern Pipe Line Company, appellee-appellant, presents herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon

appeal to review the judgment of the Supreme Court of Indiana.

I. Nature of Case and Statutory Provisions Sustaining Jurisdiction

The jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment of the Supreme Court of Indiana entered in this cause is conferred by Section 237 of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. 344 (a)).

In this cause there is drawn in question the validity of statutes of the State of Indiana on the ground of their being repugnant to the Constitution of the United States, and the judgment appealed from sustains the validity of said statutes and was rendered by the highest court of the State of Indiana in which a decision in the suit could be had.

The facts from which this appeal arises may be briefly stated as follows:

Appellee-appellant produces natural gas in Kansas and Texas and purchases natural gas produced by others in Texas, Oklahoma and Kansas. It owns and operates a pipe line system extending from these states through the states of Kansas, Missouri, Illinois, Indiana, Ohio, and Michigan, through which it transmits natural gas which it sells and delivers to local distributing companies for resale to local consumers, and to large industrial consumers under individual contracts. Prior to October 13, 1944, it was selling and delivering directly to one large industrial consumer in Indiana, Anchor-Hocking Glass Corporation, at Winchester, Indiana. The quantities delivered to said consumer were much larger than the amounts purchased by some of the smaller distributing companies for resale. Appellee-appellant has at no time complied or attempted to comply with the requirements of the Indiana Public Service Com-

mission Act (Ind. Acts 1941, c. 101, p. 255; Ind. Acts 1945, c. 46, p. 92; Burns' Indiana Statutes Annotated, 1933, Sections 54-101, *et seq.*). On October 13, 1944, purporting to act under the authority of Burns' Indiana Statutes Annotated, 1933, Section 54-112, Ind. Acts 1941, c. 101, sec. 5, p. 259 (authorizing summary investigations on the Commission's own motion of any matter relating to any public utility), the Public Service Commission of Indiana ordered a formal investigation of appellee-appellant's right to supply gas for consumption within the State of Indiana without complying with the requirements of the Indiana Public Service Commission Act relating to public utilities.

On November 21, 1945, said Commission entered an order in which it asserted jurisdiction to regulate rates and service for appellee-appellant's direct sales to industrial consumers in the State of Indiana and required appellee-appellant to file tariffs covering rates, rules and regulations appertaining to such sales and certain reports, as more particularly shown in the order set forth in full in the Appendix hereto.

On January 11, 1946, appellee-appellant filed in the Randolph Circuit Court of Randolph County, Indiana, an action against appellant-appellee, the Public Service Commission of Indiana, to vacate and set aside said order and enjoin the enforcement thereof. The complaint alleged that said order and any statute of the State of Indiana purporting to authorize such order, if applied to the business of appellee-appellant, unlawfully regulate and burden interstate commerce in violation of Article I, Section 8 (3) of the Constitution of the United States.

On February 5, 1946, during the pendency of the action, appellants-appellees Central Indiana Gas Company, Greenfield Gas Company, Inc., Northern Indiana Public Service Company, Kokomo Gas & Fuel Company, Indiana Gas & Water Company, Inc., and Southern Indiana Gas & Elec-

tric Company, all being gas company utilities engaged in the local distribution of natural gas purchased from appellee-appellant, filed petitions for leave to intervene in the proceedings on the ground that each had a direct interest in the issue of appellant-appellee Commission's power and authority to regulate the distribution and sale of natural gas to industrial consumers, and that each would be directly affected by the determination thereof. These petitions were granted on February 13, 1946, and thereafter the intervening utilities actively participated in the proceedings to uphold the validity of appellant-appellee Commission's orders.

On April 9, 1946, while said cause was pending, said Commission entered a supplemental order in which it held that filing of the various matters specified in the original order for information purposes only, as appellee-appellant had offered to do, would not be a compliance with said order and reasserted jurisdiction to regulate rates and service with reference to direct sales and deliveries to industrial consumers. This action was brought into the pending cause by supplemental complaint.

On May 11, 1946, the Randolph Circuit Court rendered judgment vacating and setting aside said order of November 21, 1945 and the order supplemental thereto dated April 9, 1946, and enjoining the enforcement thereof. (The above facts are substantially stated in the opinion of the Supreme Court of Indiana appended hereto, Appendix "A", at pp. 24 to 27.)

Thereafter, on February 5, 1947, the Supreme Court of Indiana entered its judgment reversing the judgment of the Randolph Circuit Court, with instructions to enter judgment denying appellee-appellant the relief sought on the ground that, notwithstanding the order of said Public Service Commission of Indiana constituted an assertion of regulatory jurisdiction with respect to rates and services of appellee-appellant's business of selling and delivering

direct to large industrial consumers in Indiana natural gas transported into Indiana in interstate commerce, such sales being for consumption are subject to state regulation because of paramount local, rather than national, interest.

II. State Statutes, the Validity of Which Is Involved

The state statutes, the validity of which was drawn in question and sustained in this suit, are:

(1) an order issued by the Public Service Commission of Indiana, November 21, 1945, as supplemented by a further order of said Commission issued April 9, 1946, asserting and exercising jurisdiction and authority to regulate, especially with respect to rates and service, appellee-appellant's interstate sales and deliveries, under individual contracts, of natural gas transported by pipe line from Texas and Kansas and delivered in Indiana directly to large industrial consumers.

(2) The Public Service Commission Act of Indiana (Ind. Acts 1941, c. 101, p. 255; Ind. Acts 1945, c. 46, p. 92; Burns' Indiana Statutes Annotated, 1933, Sections 54-101 *et seq.*) and particularly that paragraph of Section 54-105 (Ind. Acts 1933, c. 190, Sec. 1, p. 928) which defines a "public utility" subject to the provisions of the Act and Section 54-601A (Chapter 53 of the Acts of the General Assembly of Indiana of 1945, referred to as "Section 97A of the Public Service Commission Act" by the Commission in its order).

(1) The Commission's order issued November 21, 1945, and the supplement thereto issued April 9, 1946, are set forth in full as Appendix "C" and Appendix "D," respectively, hereto, at pp. 61 to 161. The order, as supplemented, constitutes a "statute" within the meaning of the term as used in Title 28 U. S. C. Sec. 344(a): *Williams v. Bruffy*, 96 U. S. 176, 183; *King Mfg. Company v. City of Augusta*, 277 U. S. 100; *Ex Parte Williams*, 277 U. S. 267; *Northwestern Bell Telephone Company v. Nebraska State Railway Commission*, 297 U. S. 471.

While the original order issued November 21, 1945, required appellee-appellant only to file its tariffs, rates and certain reports and reserved for future consideration Commission action in the event that appellee-appellant should seek to make direct sales and deliveries to industrial consumers in Indiana without a certificate of public convenience and necessity issued by the Commission, it specifically asserted jurisdiction to regulate such sales with respect to rates and service, and the supplemental order issued April 9, 1946 established unqualifiedly that the Commission was not merely seeking information from appellee-appellant but was asserting complete and full authority to regulate its interstate business in Indiana. Furthermore, the Supreme Court of Indiana, construing the Commission's order, said (Appendix "A", pp. 27-28):

"We hold that the orders of the Commission, in this case, constitute an unequivocal assertion of power and jurisdiction to regulate and fix rates upon sales of natural gas from appellee's interstate pipe line direct to large industrial consumers of gas in Indiana, and that they were sufficient to present to the trial court and to this court the question of the jurisdiction and power of appellant Commission to fix rates for such sales and service and to make regulations with reference to same."

(2) The Public Service Commission Act of Indiana provides a complete scheme of regulation of "public utilities" and vests authority in the Public Service Commission of Indiana to administer the Act and to issue final legislative orders having the force of law with respect to the business of persons coming within the term "public utility" as defined in Ind. Acts 1933, c. 190, sec. 1, p. 928; Sec. 54-105, Burns' Indiana Statutes Annotated, 1933, Vol. 10, p. 335. On this section of the Act, the Commission based its jurisdiction to regulate Parhandle's interstate sales of natural gas to industrial consumers in Indiana. The Supreme

Court of Indiana construed this section of the Act as sustaining such jurisdiction (see quotations from opinion, post pp. 14-15). The pertinent paragraphs of this section of the Act read as follows:

"Section 54-105 (12672). Definitions of Terms—

Short title of act.—The term 'public utility' as used in this act shall mean and embrace every corporation, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, that now or hereafter may own, operate, manage or control any street railway or interurban railway or any plant or equipment within the state for the conveyance of telegraph or telephone messages, or for the production, transmission, delivery or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service either directly or indirectly to or for the public, but said term shall not include a municipality that may now or hereafter acquire, own, or operate any of the foregoing facilities.

"The term 'utility' as used in this act shall mean every street railway or interurban railway, and every plant or equipment within the state used for the conveyance of telegraph and telephone messages, or for the production, transmission, delivery or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service either directly or indirectly to the public."

Section 54-601A (Chapter 53 of the Acts of the General Assembly of Indiana of 1945) was, as stated in the opinion of the Supreme Court of Indiana (see quotation from opinion, post p. 15), "aimed directly at the natural gas business, and by the act a 'gas utility' was defined to mean and include 'any public' utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the State of Indiana for his, its or their domestic, commercial or industrial use.'" Since it is comparatively short, this particular section of the Public Service Com-

mission Act of Indiana is set forth in full as Appendix "E" hereto at pp. 162-165. Its principal purpose appears to be to vest in the Commission control over competition in the sale of natural gas to industries through the requirement of a certificate of public convenience and necessity before any sale can lawfully be made. However, Ind. Acts, 1913, c. 76, sec. 99, p. 167 (Burns' Ind. Stat. Ann., 1933, Sec. 54-603) prohibits the granting, except to an Indiana corporation or citizen, of any license, permit or franchise to own, operate, manage or control any plant or equipment of any public utility.

Other provisions of the Act authorize the Commission to value all the property of every public utility (Sec. 54-203;¹ Ind. Acts 1933, c. 190, sec. 4, p. 933); to require that a public utility shall keep all books, accounts, papers and records within the state and to prohibit their removal from the state without permission of the Commission (Sec. 54-212; Ind. Acts, 1915, c. 110, sec. 1, p. 457); to inspect and examine any and all books, accounts, papers, records and memoranda kept by such public utility (Sec. 54-215; Ind. Acts, 1913 c. 76, sec. 21, p. 175); to ascertain and determine the proper and adequate rates of depreciation of the several classes of property of each public utility (Sec. 54-216; Ind. Acts 1925, c. 64, sec. 1, p. 210); to supervise and regulate arrangements between a public utility and its customers or consumers or with its employees, such arrangements being unlawful unless approved by the Commission (Sec. 54-221; Ind. Acts 1913, c. 76, sec. 27, p. 177); and to fix rates, charges and regulations governing terms of service (Secs. 54-222 and 54-223; Ind. Acts 1913, c. 76, sec. 28, p. 177). The Act also provides that every public utility shall file its schedules of rates and terms of service with the Commission (Sec. 54-313; Ind. Acts 1913, c. 76, sec. 41, p. 180) and that no changes

¹ Here, and in each subsequent citation in this paragraph, the first source given refers to the particular section of Burns' Ind. Stat. Ann. 1933, wherein the provision is codified.

in schedules of rates and charges shall be made without approval of the Commission (Sec. 54-317; Ind. Acts 1913, c. 76, sec. 45, p. 181); confers upon the Commission extensive authority over management of the business and compensation of officers and employees of a public utility (Sec. 54-402; Ind. Acts 1927, c. 146, sec. 1, p. 445); confers upon the Commission extensive authority over the holders of the voting capital stock of all public utility companies under its jurisdiction, affiliated interests and contracts with affiliates (Sec. 54-402; Ind. Acts 1933, c. 190, sec. 6, p. 935); and confers upon the Commission extensive authority over the issuance and sale of bonds, notes or other evidences of indebtedness by a public utility and the application of the proceeds from the same (Secs. 54-504 and 54-505; Ind. Acts 1933, c. 190, sec. 8, p. 941; Ind. Acts 1913, c. 76, sec. 92, p. 196).

III. Date of Judgment and Date on Which Application for Appeal Was Presented and Allowed

The date of the final decision and judgment sought to be reviewed is February 5, 1947.

The original decision and judgment of the Supreme Court of Indiana, which ordered entry of judgment by the trial court denying relief to appellee-appellant, was rendered on February 5, 1947.

Appellee-appellant thereafter timely filed a petition for rehearing, which petition was denied by the Supreme Court of Indiana on March 25th, 1947, making such date that of final judgment. *Citizens Bank of Michigan City, Indiana v. Opperman*, 249 U.S. 448, 449. Under the Constitution of Indiana, the Supreme Court of Indiana is the court of last resort in the state. (Constitution of the State of Indiana, Article VII, Section 1.)

The petition for appeal to the Supreme Court of the United States was filed and allowed on March 25th, 1947.

IV. Manner in Which Federal Question Was Raised

The Federal Question was raised at the outset and urged throughout all the proceedings in the State Court. In response to the statutory notice given by the Public Service Commission of Indiana, setting for hearing the proceeding commenced by it on October 13, 1944, appellee-appellant filed written objections to said proceeding and the exercise by said Commission of any jurisdiction therein, specifying that "any action or order of the Public Service Commission of Indiana herein purporting to regulate, interfere with, or otherwise affect the sale and delivery by Panhandle Eastern Pipe Line Company to Anchor-Hocking Glass Company of natural gas transported in interstate commerce would unlawfully burden interstate commerce in violation of Article I, Section 8(3) of the Constitution of the United States and that if Sections 54-112 *et seq.*, Burns' Indiana Statutes Annotated, 1933, or any other statute, is construed to purport to authorize said Commission to regulate, interfere with or otherwise affect such sale and delivery such statutes as so construed are unconstitutional and void because of violation of Article I, Section 8(3) of the Constitution of the United States." (R. 194A, 194B, p. 8 of Commission Order, Appendix "C", Post p. 70)

The complaint filed by appellee-appellant in the Randolph Circuit Court alleged that the order of the Public Service Commission sought to be vacated and set aside unlawfully regulates and burdens interstate commerce in violation of Article I, Section 8(3) of the Constitution of the United States, and that any statute of the State of Indiana construed to authorize such order, if applied to the business of appellant, unlawfully regulates and burdens interstate commerce in violation of Article I, Section 8(3) of the Constitution of the United States. (R. 29, 30.)

Moreover, the Supreme Court of the United States has jurisdiction on appeal where "it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity" (*Charleston Federal Savings and Loan Association, et al. v. Alderson*, 324 U.S. 182, 185). The opinion of the Supreme Court of Indiana, appended to this statement, affirmatively shows that the Federal Question was presented to, considered and decided by it. In its opinion, the Supreme Court of Indiana said in part:

"In this case we have to do with the right of the State of Indiana to regulate service and fix rates upon deliveries of natural gas from an interstate pipe line direct to large industrial consumers within the State." (Appendix "A", post p. 24)

.

"In the original order, the Commission concluded and said "that the distribution in Indiana of natural gas direct to consumers is subject to regulation by this Commission under the laws of this state." It was contended by appellee that the Commission's order constituted an assumption of jurisdiction to regulate appellee's rates and service direct to consumers in Indiana, and that such regulation could not be accomplished without violation of the Commerce Clause of the Federal Constitution. Accordingly appellee filed a statutory action to secure a judicial review of said order and to have said order set aside and its enforcement enjoined." (Appendix "A", post p. 26)

.

"We hold that the orders of the Commission, in this case, constitute an unequivocal assertion of power and jurisdiction to regulate and fix rates upon sales of nat-

ural gas from appellee's interstate pipe line direct to large industrial consumers of gas in Indiana, and that they were sufficient to present to the trial court and to this court the question of the jurisdiction and power of appellant Commission to fix rates for such sales and service and to make regulations with reference to same.

"The trial court reached the conclusion that the delivery of natural gas by appellee direct to industrial consumers connected with its lines constituted interstate commerce and that the orders of the Public Service Commission of Indiana under attack violated the commerce clause of the Federal Constitution, and it vacated and set aside the orders of the Public Service Commission of Indiana complained of and enjoined the Commission and the members thereof from enforcing said orders or any paragraph thereof." (Appendix "A", post pp. 27-28)

.

"Appellee contends that under the rule just stated where gas flows continuously without interruption from out-state gas fields direct to in-state consumers, the deliveries to in-state consumers constitute interstate commerce. We recognize that this is a sound conclusion, but it is contended by appellants that there is interruption in the flow of gas to Anchor-Hocking and that the sales and deliveries to Anchor-Hocking are, and that in the future sales to other large industrial consumers will be, intrastate in nature. This is predicated largely upon the fact that gas is diverted at low pressures from the main line high-pressure supply into lateral and branch lines in such manner that the diverted gas cannot be restored to the high pressure main line flow." (Appendix, "A", post pp. 28-29)

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"However, it is now well established that sales and deliveries from interstate pipe lines to local utilities for resale are interstate transactions. *Natural Gas Act*, 15 USCA, § 717 (b); *Missouri ex rel. Barrett v.*

Kansas Natural Gas Co., supra; Public Utilities Commission v. Landon, supra; State Corporation Commission v. Wichita Gas Co. (1934), 290 U. S. 561, 563, 78 L. ed. 500, 502: Such sales and deliveries are, so far as segregation and reduced pressures are concerned, almost exactly like sales direct to large industrial consumers. For example, gas for Anchor-Hocking and gas for the Indiana-Ohio Company, the distributing utility serving the City of Winchester, and other towns thereabout leave the main line through the same lateral and at identical pressures. In fact they are inseparably a part of the same flow. This common flow continues until the lateral divides close to points of delivery to Anchor-Hocking and the Indiana-Ohio Company. As has already been shown, the pressures there, while not exactly the same to each, are substantially the same. If the segregation and reduced pressure for delivery to the Indiana-Ohio Company do not make such transactions intrastate commerce under the 'broken package' theory, we cannot vary consistently apply the 'broken package' theory to almost identical deliveries to Anchor-Hocking. (Appendix "A", post pp. 29-30)

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"Under the language and holdings of the cases above cited and quoted, the circumstances of the case before us seem to permit state regulation of sales direct from interstate pipe lines to Indiana consumers." (Appendix, "A", post pp. 32-33)

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"The State of Indiana, in its scheme of utility regulation, controls sales to all other consumers of gas brought into Indiana through interstate pipe lines. The sales by local distribution utilities are regulated by the state. The record shows that many industrial consumers are thus provided with natural gas derived from exactly the same source. If sales to some are regulated by the State and others are free from regulation confusion is natural."

"Also if Indiana may not regulate the sale of natural gas from interstate pipe lines direct to large industrial consumers in Indiana, such sales and deliveries will not be regulated at all under present law. The result will not only be that the pipe line owners, free of regulations, will have advantage over regulated local utilities in competing for business from large industrial commerce, but the customers of the pipe lines may be given advantage over the customers of the local utilities. Local utilities whose costs per unit of gas have been increased by the reduced volume of sales caused by the direct deliveries from the pipe lines will be entitled to higher rates and resulting price disparity unfavorable to customers of the local utilities will tend to break down the state system of regulation which will have fixed, and appear to be responsible for, the unfavorable local rates. This probable result, it seems to us, is a weighty consideration in balancing national interest against local need" (Appendix "A", post pp. 36-37).

"In the case before us the sales are and will be to local customers for their own consumption. Therefore, paraphrasing the language quoted, the local interest is paramount and interference with interstate commerce, if any, is of minor importance and permissible." (Appendix "A", post p. 38)

"We also have an Indiana statute which defines a public utility, subject to control of the Indiana Public Service Commission, to be ' . . . every corporation . . . , that now or hereafter may own, operate or control any . . . plant or equipment . . . for the . . . transmission, delivery or furnishing of heat, light, water or power . . . either directly or indirectly to or for the public . . . ' § 54-105 Burns' 1933.

“Another Indiana Statute became law on February 26, 1945, before the orders involved in this action were made by the Indiana Public Service Commission. Acts of 1945, Chap. 53, p. 110. This act adds an additional section to the Indiana Public Service Commission Act aimed directly at the natural gas business, and by the act a ‘gas utility’ was defined to mean and include ‘any public utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the State of Indiana for his, its or their domestic, commercial or industrial use.’ Certainly appellee is selling and proposing to sell gas directly to consumers in Indiana.

“The bottom question on this phase of the case is whether the appellee is furnishing gas in Indiana directly or indirectly to or for the public. Admittedly it is selling gas in Indiana indirectly to and for the public through distributing companies and that makes it a public utility under the Indiana statute, subject to regulation and control by the Indiana Public Service Commission. Also admittedly it is selling and proposing to sell gas directly to consumers within the state. This part of its business and its interstate transportation and its sales to local distributing utilities are so integrated that in any practical consideration of the state’s right to regulate direct sales to consumers that activity must be appraised as a part of its entire business in Indiana. Its rights and duties, with reference to such direct sales, must be determined in the light of its over-all character in the State of Indiana. It will compete with local activities in soliciting industrial business and will be in position to discriminate in its service and in its rates and in its regulations. This freedom is inconsistent with all concepts of the duties and obligations of a person or corporation engaged in such business.

“The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and

choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give." (Appendix "A", post pp. 40-41)

V. Opinions.

The opinion of the Public Service Commission of Indiana was incorporated with its order issued November 21, 1945, and is set forth in full as Appendix "C" hereto, post pp. 61-148. Upon appellee-appellant's application to the Randolph Circuit Court for a judicial review of the Commission's order and to have said order set aside and its enforcement enjoined, Judge Macy, presiding in that court, rendered an opinion sustaining appellee-appellant's contention that the order, together with the order supplemental thereto issued April 9, 1946, and the underlying statutes upon which said order as supplemented was based, as applied to its business, were repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States and entered a judgment granting the relief prayed by appellee-appellant. Judge Macy's opinion is set forth in full as Appendix "B" hereto, post pp. 43-60. The opinion of the Supreme Court of Indiana, reversing the judgment of the Randolph Circuit Court and sustaining the order of the Commission and the underlying statutes involved, as applied to appellee-appellant's business, is set forth in full as Appendix "A" hereto, post pp. 24-42. It is not yet reported.

VI. The Federal Questions Involved Are Substantial

The questions involved are substantial and of great importance not only to appellee-appellant but also to the public. If the State of Indiana, through its Public Service Commission, can regulate (with the power to prohibit through denial of certificates of convenience and necessity) rates and service with respect to the interstate sale and

delivery of natural gas by appellee-appellant direct to large industrial consumers in the State of Indiana, the same regulatory power may be exerted by the seven other states traversed by appellee-appellant's interstate pipe line, namely, Texas, Oklahoma, Kansas, Missouri, Illinois, Indiana, Ohio and Michigan.² Whereas, at the commencement of the proceedings below, appellee-appellant had only one direct sale in the State of Indiana (namely, to Anchor-Hocking Glass Company at Winchester, Indiana), and at the conclusion of the proceedings only two (the second being to E. I. DuPont de Nemours at Fortville, Indiana), its substantial volume of direct sales from its interstate pipe line to industrial customers over its entire system (the treatment of the revenue from which by the Federal Power Commission was an issue in *Panhandle Eastern Pipe Line Company v. Federal Power Commission, et al.*, 324 U. S. 635) would be subjected to state regulation in the respective states where such interstate sales and deliveries are made. Furthermore, such regulatory power may be exerted by the several states over the direct interstate sales of other natural gas pipe line companies. The primary question presented, therefore, is of grave importance not only to the natural gas industry, whose increasing national importance may be regarded as judicially known, but also to the numerous state regulatory commissions in the states traversed by interstate natural gas pipe lines.

In deciding the primary question adversely to the appellee-appellant, the Supreme Court of Indiana departed in a

² Although it does not appear in the record, being mentioned only in the briefs and argument, all parties to this cause know that there is now pending before the Supreme Court of Michigan an appeal from a decision (not yet reported) rendered October 5, 1946, by the Circuit Court for the County of Ingham, Michigan, setting aside and enjoining as an unconstitutional burden on interstate commerce, an order of the Michigan Public Service Commission seeking to regulate appellee-appellant's direct sales from its interstate pipe line to large industries in Michigan.

number of respects from the course marked by decisions of the Supreme Court of the United States.

By holding that the state in which natural gas, which has been sold under individual contracts specifying the price therefore and transported from other states in interstate commerce, is delivered in wholesale quantities to large industrial consumers, may regulate the rates for said sales, the Supreme Court of Indiana has sanctioned the imposition of a direct burden on such commerce "which may fairly be deemed to have the effect of impeding the free flow of trade between states" and interferes with "the area of trade free from interference by the states" which is created by the Commerce Clause of its own force, *Freeman v. Hewit* (Dec. 16, 1946), 329 U. S. 249, 252; *Missouri ex rel. Barrett v. Kansas Natural Gas Co.* (1924), 265 U. S. 298; *Public Utilities Comm. v. Attleboro Steam & Electric Company* (1927), 273 U.S. 83, 71 L. Ed. 549. The power to regulate the price at which a commodity is sold in interstate commerce is a dominant power over the commerce in the same manner as the power to tax and is not a regulation of a local aspect of commerce. (Cf. *Freeman v. Hewit* (Dec. 16, 1946), 329 U. S. 249.) The Supreme Court of Indiana has held that such sales are of paramount local, rather than national, interest and importance and that uniformity of regulation, if regulation is to be imposed, is unnecessary, and has predicated the right of state regulation on such conclusion, but the Supreme Court of the United States is, under the Commerce Clause, the final arbiter of the competing demands of state and national interest. *Southern Pac. Co. v. Arizona*, 325 U. S. 761, 769; *Morgan v. Virginia*, 328 U. S. 373, 380.

In determining that local interest outweighs national interest and justifies state regulation of interstate sales to industrial consumers, the Supreme Court of Indiana has

held that such regulation is necessary to protect local distributing companies from unregulated interstate pipe line company competition for industrial consumer business, to protect local consumers from higher rates which would be necessitated by a reduced volume of industrial consumer business for local distributing companies, and to protect industrial consumer customers of local distributing companies from disadvantages which would be suffered if customers of interstate pipe line companies were given more favorable rates. The consideration of local interest of this character as a basis for local regulation is at variance with principles stated by the Supreme Court of the United States in the following decisions: *Public Utilities Comm. v. Attleboro Steam & Electric Co.* (1927), 273 U. S. 83; *Baldwin v. Seelig* (1935), 294 U. S. 511; *Buck v. Kuykendall* (1925), 267 U. S. 307; *Busch & Sons Co. v. Maloy* (1925), 267 U. S. 317.

The Supreme Court of Indiana, in failing to hold applicable *Missouri ex rel Barrett v. Kansas Natural Gas Co.* (1924), 265 U. S. 298, and *Public Utilities Commission v. Attleboro Steam and Electric Co.* (1927), 273 U. S. 83, 71 L. Ed. 549, and determining that *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, was controlling, conceded that sales and deliveries from interstate pipe lines to local utilities are, "so far as segregation and reduced pressures are concerned, almost exactly like sales direct to large industrial consumers," but stated that the decisions of the Supreme Court of the United States seemed to it "to indicate that the test is whether or not local business is involved and that supplying local consumers is a local business." But the Supreme Court of the United States has never held that the determination of whether local or national interest is paramount depends solely on whether the sale of commodities transported in interstate commerce is for resale or consumption. The conclusion reached by the

Supreme Court of Indiana that the use to which the buyer intends to put the commodity purchased is the controlling test conflicts with statements made by the Supreme Court of the United States in *Schollenberger v. Pennsylvania* (1898), 171 U. S. 1, 24, and *Hooven & Allison Co. v. Evatt* (1945), 324 U. S. 652, 667. In the decisions of the Supreme Court of the United States relied on by the Supreme Court of Indiana, local interest was obviously predicated on local activities of the seller rather than the intended use of the buyer. *Missouri ex rel. Barrett v. Kansas Natural Gas Co.* (1924), 265 U. S. 298, 309. The Supreme Court of the United States has held that "the business of supplying, on demand, local consumers, is a local business," even though the gas be brought from another state, and drawn for distributing directly from interstate mains," and "whether the local distribution be made by the transporting company or by independent distributing companies" (265 U. S. 298, 309), but this principle has no application to direct deliveries under individual contracts in wholesale quantities. (Cf. *Walling v. Jacksonville Paper Co.* (1943), 317 U. S. 564; *Roland Electric Co. v. Walling* (1946), 326 U. S. 657, 90 L. Ed. (adv. op.) 362.)

Under the opinion of the Supreme Court of Indiana the door is opened for state regulation of the price at which other commodities found to be "affected with a public interest" may be sold in interstate commerce, provided only that the purchase is for consumption and not for resale. There can be no reason for the application of a different principle because the commodity is natural gas. *Pennsylvania v. West Virginia* (1922), 262 U. S. 553, 596. Other commodities have been held subject to state and federal price regulation. *U. S. v. Rock Royal Cooperative* (1938), 307 U. S. 553, 570, 571.

The Supreme Court of Indiana has asserted as a reason for subjecting interstate sales to industrial consumers to state regulation that otherwise such sales would be unregulated, but the Supreme Court of the United States has denied such a principle as a basis for state regulation of a selling price for natural gas sold and delivered in interstate commerce. *Missouri ex rel. Barrett v. Kansas Natural Gas Company* (1924), 265 U. S. 298, 308; *Public Utilities Commission v. Attleboro Steam and Electric Company* (1927), 273 U. S. 83, 90.

The Indiana court also inferred from the failure of Congress to include regulation of rates for interstate sales to industrial consumers in enacting the Natural Gas Act that Congress determined such sales to be of paramount local interest and therefore properly subject to state regulation. Aside from the lack of any conclusive evidence as to the intention or belief of Congress with reference to such sales, the Supreme Court of the United States has not heretofore held that Congress may redefine the distribution of power over interstate commerce (cf. *Southern Pac. Co. v. Arizona*, 325 U. S. 761, 769; *Prudential Ins. Co. v. Benjamin* (1946), 328 U. S. 408) so as to remove the protection of the Commerce Clause by its mere failure to include a wholly interest phase of a business in a scheme of federal regulatory legislation.

The opinion of the Indiana court also states that since appellee-appellant is admittedly selling natural gas in Indiana directly to and for the public through distributing companies, it is a public utility as defined in Section 54-105, Burns' Indiana Statutes Annotated, 1933; Ind. Acts 1933, c. 190, sec. 1, p. 928, subject to regulation and control by the Indiana Public Service Commission, and that its sales to industrial consumers and its interstate transportation and sales to local distributing companies are so integrated that

its rights and duties with reference to such direct sales must be determined in the light of its overall character in Indiana. The assertion of jurisdiction to regulate and control with reference to sales to distributing companies, by reason of the Indiana statutory definition of a public utility, conflicts not only with *Missouri ex rel. Barrett v. Kansas Natural Gas Co.* (1924), 265 U. S. 298; *Peoples Natural Gas Co. v. Public Service Commission* (1926), 270 U. S. 550; and *State Corp. Comm. v. Wichita Gas Co.* (1934), 290 U. S. 561, 563; but also with *Illinois Natural Gas Co. v. Central Illinois Public Service Company* (1941), 314 U. S. 498, and *Public Utilities Commission v. United Fuel Gas Co.* (1943), 317 U. S. 456.

The Indiana court, in its opinion (Appendix "A" p. 37) states that "the exact question now before this court has never been decided by the Supreme Court of the United States." While appellee-appellant agrees with this statement (cf. *Arkansas-Louisiana Gas Co. v. Department of Public Utilities, et al.*, 304 U. S. 601), it insists that the judgment from which this appeal is taken is clearly contrary to settled principles of law established by the foregoing decisions of the Supreme Court of the United States and should, in the public interest, be reviewed and reversed.

An authoritative decision of the Supreme Court of the United States settling the question will be of great benefit to the natural gas industry and to the numerous state regulatory bodies concerned and will prevent diversity of rulings by courts of last resort in the states where interstate pipe line companies make interstate sales of natural gas directly to large industrial customers. In this connection, we mention *State, ex rel. Cities Service Co. v. Public Service Commission* (1935), 85 S. W. (2d) 1890, cert. den. (1936) 296 U. S. 657, wherein the Supreme Court of Missouri held

that interstate sales of natural gas by the pipe line company direct to industrial consumers could not be subjected to state regulation.

Respectfully submitted,

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APPENDIX "A"

APPENDIX TO JURISDICTIONAL STATEMENT
OPINION OF INDIANA SUPREME COURT

IN THE SUPREME COURT OF INDIANA

No. 28225

February 5, 1947. 63rd Judicial Day. November Term 1946.

THE PUBLIC SERVICE COMMISSION OF INDIANA, et al.

VS.

PANHANDLE EASTERN PIPE LINE COMPANY.

Appeal from Randolph Circuit Court.

YOUNG, J.;

In this case we have to do with the right of the State of Indiana to regulate service and fix rates upon deliveries of natural gas from an interstate pipe line direct to large industrial consumers within the State.

Appellee owns a large pipe line, through which it transports natural gas from Texas and Kansas into and across intervening states, including Indiana, to Ohio and Michigan. At different points along this line, gas is diverted into branch or lateral lines, smaller in size and at lower pressure, to be delivered to distribution systems owned and operated by various municipalities and public utility corporations and directly to selected, large industrial consumers of gas within practical distance of its through line.

When these proceedings started appellee furnished gas in Indiana to 10 utilities, including the corporate appellants, and four municipalities who, in turn, distributed such gas to 112,000 residential, industrial and commercial consumers in Indiana. One of these laterals takes off from the main line near Winchester, Indiana, and at the end of this lateral there are two branches, one leading to a meter house, through which deliveries are made to Indiana-Ohio Public Service Company, which owns a distribution system serving Winchester and nearby territory. The other branch leads to another meter house, through which gas is delivered direct

to the Anchor-Hocking Glass Corporation for its own consumption. Service to Anchor-Hocking is, and service to other large industrial consumers will be, under special, privately negotiated contracts, each upon terms agreed upon for its particular case.

Appellee's gas enters Indiana at a pressure of about 250 pounds per square inch in 22 inch mains. After reaching Indiana the pressure is reduced to approximately 200 pounds per square inch in 16 inch mains. When the Winchester lateral leaves the main line, pressure is reduced to 80 or 100 pounds per square inch and there is no provision whereby it may ever be returned to the main line. Thereby it is segregated from the gas flowing interstate in the main line but the continuity of flow from the source to the meter houses is not interrupted. At the meter houses referred to pressure is again reduced and some deliveries are made to Anchor-Hocking at 40 pounds per square inch and some at 10 pounds per square inch. Deliveries are made to the Indiana-Ohio Public Service Company at 9 to 25 pounds per square inch. In both cases all facilities up to the pipe on the outlet side of the meter houses are owned and operated by appellee. The Winchester lateral is located in part on public highways in Randolph County pursuant to authority granted by the Board of Commissioners of that county to a predecessor of appellee which built the line. For what significance it may have, we know judicially that appellee's main line and other laterals could not cross the state and branch out into the areas served without at least crossing highways and probably otherwise using same pursuant to arrangement with local governmental units.

The quantity sold to Anchor-Hocking is many times the quantity sold to the Indiana-Ohio Company. Anchor-Hocking was the only industrial consumer in Indiana served direct by the appellee at the time of the commencement of these proceedings. Subsequently, however, service direct to a DuPont plant, near Fortville, Indiana, was undertaken under contract and appellee had adopted a policy of furnishing gas direct to selected large industrial consumers in Indiana, as it is doing in other states. Before appellee began serving Anchor-Hocking, Anchor-Hocking had been buying

its gas from a local distributing utility which, in turn, had purchased it from appellee or its predecessor.

It appears that in like manner, as appellee begins service direct to other large industrial consumers, it will, in most, if not all, instances supplant service by local public utility companies. These local distribution utilities have expressed alarm that taking away their large customers, thereby decimating the volume of their sales, will cripple their ability to serve domestic and small commercial and industrial consumers at fair rates.

In this situation, the Public Service Commission of Indiana instituted an investigation of the affairs of the appellee so far as same relate to sales of gas under contract direct to Anchor-Hocking Glass Corporation or any other industrial consumer or consumers of natural gas within the State of Indiana. (§54-112 Burns' 1933.) The corporate appellants intervened. This investigation resulted in an order on November 21, 1945, by the Public Service Commission of Indiana, requiring appellee to file with the Commission its tariffs covering rates, ~~rules~~ and regulations pertaining to any and all sales of natural gas by appellee direct to ultimate consumers within the State of Indiana, and to file annual reports on forms prescribed by the Commission, so long as it continues to distribute gas direct to any consumer in Indiana, and to file certain other relevant reports and data. In the original order, the Commission concluded and said "that the distribution in Indiana of natural gas direct to consumers is subject to regulation by this Commission under the laws of this state." It was contended by appellee that the Commission's order constituted an assumption of jurisdiction to regulate appellee's rates and service direct to consumers in Indiana, and that such regulation could not be accomplished without violation of the Commerce Clause of the Federal Constitution. Accordingly appellee filed a statutory action to secure a judicial review of said order and to have said order set aside and its enforcement enjoined.

In the course of the hearing in the trial court, the appellant Commission contended that the action was premature because the order complained of merely required in-

formation which it was entitled to have, regardless of its power, or lack of power, to fix rates or otherwise regulate sales of gas by appellee directly to large industries for use by them in Indiana, and that no action will lie to test such power until the Commission attempts to exercise same. Acting upon this contention of counsel for the appellant Commission, appellee offered, in writing, to file with the Commission "all papers and documents specified in the order dated November 21, 1945, provided the Commission desires the same for information purposes only and not as an assertion of the regulatory jurisdiction of respondent's business, and *provided* said order is so modified or such further order is entered by the Commission as to preclude the possibility of any contention hereafter that Respondent will be in any manner prejudiced in its right to contest the jurisdiction of the Commission to regulate its said business in the event the Commission shall hereafter assert the right, power, authority or jurisdiction to regulate the same."

The Commission declined to accept appellee's filing of the required papers upon the conditions named in the appellee's offer and, in doing so, the appellant Commission made a supplemental order in which it asserted categorically that the tariffs, rates, rules and regulations, the annual reports and the accounting information, required by the original order when filed, shall be deemed to be on file and be available, among other things, for use by the Commission "in connection with the regulation of rates and service appertaining to the supplying of natural gas by Panhandle direct to consumers within the State of Indiana." Notwithstanding the language of the original and supplemental orders, the Commission continues to take the position that its power to regulate appellee's sales and deliveries of gas direct to large consumers in Indiana is not involved in this proceeding. With this contention we cannot agree.

On authority of *Public Utilities Commission v. United Fuel Gas Co.* (1943), 317 U. S. 456, 459, 465, 468, 87 L. Ed. 396, 398, 401, 403, we hold that the orders of the Commission, in this case, constitute an unequivocal assertion of power and jurisdiction to regulate and fix rates upon sales of natural gas from appellee's interstate pipe line direct to

large industrial consumers of gas in Indiana, and that they were sufficient to present to the trial court and to this court the question of the jurisdiction and power of appellant Commission to fix rates for such sales and service and to make regulations with reference to same.

The trial court reached the conclusion that the delivery of natural gas by appellee direct to industrial consumers connected with its lines constituted interstate commerce and that the orders of the Public Service Commission of Indiana under attack violated the commerce clause of the Federal Constitution, and it vacated and set aside the orders of the Public Service Commission of Indiana complained of and enjoined the Commission and the members thereof from enforcing said orders or any paragraph thereof. The Public Service Commission of Indiana, and the individual members thereof, filed a motion for a new trial and same was overruled. Likewise the corporate appellants filed motions for a new trial, which were overruled and appeals were taken to this court.

In determining whether or not the Indiana Commission has jurisdiction to regulate and fix rates for deliveries of gas by appellee, direct to large industrial consumers in Indiana, we should first consider whether such deliveries constitute intrastate commerce. If they do then the state may regulate and what the Indiana Commission has done does not violate the commerce clause of the Federal Constitution. But if they constitute interstate commerce that does not necessarily mean the state may not, under any circumstances, intervene.

Natural gas is a commodity which may be transported as an article of commerce. Its transmission from one state to another constitutes interstate commerce. *State ex rel. Corwin v. The Indiana and Ohio Oil, Gas, and Mining Co.* (1889), 120 Ind. 575, 577, 579, 22 N. E. 778; *Pennsylvania v. West Virginia* (1923), 262 U. S. 553, 596, 67 L. Ed. 1117, 1132; *Missouri ex rel. Barrett v. Kansas Natural Gas Co.* (1924), 265 U. S. 298, 307, 68 L. Ed. 1027; *Public Utilities Commission v. Landon* (1919), 249 U. S. 236, 245, 63 L. Ed. 577.

Appellee contends that under the rule just stated where gas flows continuously without interruption from out-state

gas fields direct to in-state consumers, the deliveries to in-state consumers constitute interstate commerce. We recognize that this is a sound conclusion, but it is contended by appellants that there is interruption in the flow of gas to Anchor-Hocking and that the sales and deliveries to Anchor-Hocking are, and that in the future sales to other large industrial consumers will be, intrastate in nature. This is predicated largely upon the fact that gas is diverted at low pressures from the main line high-pressure supply into lateral and branch lines in such manner that the diverted gas cannot be restored to the high pressure main line flow. They say that the continuity of movement is broken; that the gas is segregated for a particular intrastate use or uses and they apply to the "broken package" rule to make such sales to Anchor-Hocking intrastate in character. There are cases which apply the "broken package" doctrine to situations not entirely dissimilar and which lend support to appellants' contention. *East Ohio Gas Co. v. Tax Commission* (1931), 283 U. S. 465, 75 L. Ed. 1171, 1175; *Southern National Gas Corp. v. Alabama* (1937), 301 U. S. 148, 81 L. Ed. 970, 974-5; *Mississippi River Fuel Corp. v. Smith* (Mo. 1942), 164 S. W. (2d) 370, 375.

However, it is now well established that sales and deliveries from interstate pipe lines to local utilities for resale are interstate transactions. *Natural Gas Act*, 15 USCA, § 717 (b); *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, *supra*; *Public Utilities Commission v. Landon*, *supra*; *State Corporation Commission v. Wichita Gas Co.* (1934), 290 U. S. 561, 563, 78 L. Ed. 500, 502. Such sales and deliveries are, so far as segregation and reduced pressures are concerned, almost exactly like sales direct to large industrial consumers. For example, gas for Anchor-Hocking and gas for the Indiana-Ohio Company, the distributing utility serving the City of Winchester, and other towns thereabout, leave the main line through the same lateral and at identical pressures. In fact they are inseparably a part of the same flow. This common flow continues until the lateral divides close to points of delivery to Anchor-Hocking and the Indiana-Ohio Company. As has already been shown, the pressures there, while not exactly the same to each, are substantially the same. If the segrega-

tion and reduced pressure for delivery to the Indiana-Ohio Company do not make such transactions intrastate commerce under the "broken package" theory, we cannot very consistently apply the "broken package" theory to almost identical deliveries to Anchor-Hocking.

But we need not decide whether the Anchor-Hocking business and prospective sales direct to other large industrial consumers are interstate or intrastate by mechanical standards. Even if they are interstate they still may be subject to state regulation under some circumstances. It has long been established that the power of Congress over interstate commerce is not exclusive. If the Federal Government has not elected to exercise its power under the commerce clause, and if the transaction is not of such nature as to require uniform regulation on a national basis, and if it is so local in its nature and implications that local needs outweigh national interest then, even though interstate, according to mechanical tests, the state may intervene and regulate. *Minnesota Rate Cases* (1913), 230 U. S. 352, 399, 402, 57 L. Ed. 1511, 1541, 1542; *South Carolina State Highway Dept. v. Barnwell Bros.* (1938), 303 U. S. 177, 185, 82 L. Ed. 734; *Parker v. Brown* (1943), 317 U. S. 341, 359-363, 87 L. Ed. 315; *Cloverleaf Butter Co. v. Patterson* (1942), 315 U. S. 148, 155, 86 L. Ed. 754; *Southern Pacific Co. v. State of Arizona* (1945), 325 U. S. 761, 766, 89 L. Ed. 1915; *Kelly v. Washington* (1937), 302 U. S. 1, 10, 82 L. Ed. 3.

In the *Minnesota Rate Cases*, *supra*, the question of the conflicting claims of the State and the Federal Government, with reference to interstate commerce regulations, arose. Mr. Justice Hughes, in commenting upon this conflict, said, on p. 399:

"... It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority

overrides all conflicting state legislation." (Citing many authorities.)

Following this language, the opinion states several things affecting interstate commerce (not involved in the case before us) which the states have no right to do and then on page 402 the court used the following language:

"But within these limitations there necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. . . . Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal Power. . . ."

In *Cloverleaf Butter Co. v. Paterson*, *supra*, the right of the state to act with reference to interstate commerce is stated in the following words, beginning near the bottom of page 155 of 315 U. S.:

" . . . It has long been recognized that in those fields of commerce where national uniformity is not essential,

either the state or federal government may act. *Willson v. Black Bird Creek Marsh Co.*, 2 Pet (US) 245, 7 L. Ed. 412; *California v. Thompson*, 313 US 109, 114, 85 L. Ed. 1219, 1221, 61 S. Ct. 930. Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. But where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application."

These cases, and the language which we have quoted from them, establish that a state may interfere with interstate commerce under some circumstances and indicate those circumstances to be much as we have set them forth above.

The cases cited show a substantial abandonment of the mechanical test of when and where interstate commerce ends and intrastate commerce begins and test the right of states to regulate and tax local phases of interstate commerce by recognizing conflicting state and federal interests and attempting to compose and accommodate and adjust the competing demands that are inherent in our dual form of government. *United States v. South-Eastern Underwriters Association* (1944), 322 U. S. 533, 546, 547, 88 L. Ed. 1440. And the trend of the later cases is as stated in *Prudential v. Benjamin* (1946) 90 L. Ed. (Adv. Op.) 1023, 1030, 1031. In that case the broadening of the field of federal intervention in interstate commerce was discussed and then the following language was used at page 1030:

"... the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce, and to doing so by a new, or renewed, emphasis on facts and practical considerations rather than dogmatic logistic . . ."

Under the language and holdings of the cases above cited and quoted, the circumstances of the case before us seem

to permit state regulation of sales direct from interstate pipe lines to Indiana consumers. In reaching this conclusion we find the first prerequisite of state control, i. e. that the federal government has not undertaken to regulate such business. No regulation of interstate natural gas pipe lines and distribution by and through same was attempted by the federal government until Congress passed the Natural Gas Act in 1938. 15 U. S. C. A. § 717, et seq. By the Natural Gas Act, § 1 (b), Congress limited the application of the Act by the following language:

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." (Our italics.)

It will be seen that the only sales of natural gas subject to the statute are those for resale. Specifically it does not apply to any other sales, which definitely excludes from its operation direct sales to large industries for their own consumption. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (1945), 324 U. S. 635, 646, 89 L. Ed. 1241; *Colorado Interstate Gas Co. v. Federal Power Commission* (1945), 324 U. S. 581, 588, 89 L. Ed. 1206.

The statute followed the decided cases. The Supreme Court had held that states could not regulate the sale of natural gas from interstate pipe lines to local utilities for resale and distribution through local distribution systems. *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, *supra*; *State Corp. Commission v. Wichita Gas Co.*, *supra*.

Likewise, it had been established that the states did have jurisdiction over sales by local distributing companies, even though the gas had come directly from interstate pipe lines. *Public Utilities Comm. v. Landon*, *supra*; *Pennsylvania Gas Co. v. Public Service Commission* (1919), 252 U. S. 23, 64 L. Ed. 434.

The statute, therefore, served to affirm and implement the rights of control, which the cases had already established. That this was the intent of Congress is shown by the legislative history of the statute. *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, *supra*; *Illinois Natural Gas Co. v. Central Illinois Public Service Co.* (1942), 314 U. S. 498, 506, 507, 86 L. Ed. 371; *Colorado Interstate Gas Co. v. Federal Power Commission* (1944), 324 U. S. 581, 600, 601, 89 L. Ed. 1206; *Federal Power Commission v. Hope Natural Gas Co.* (1943), 320 U. S. 591, 609, 610, 88 L. Ed. 333.

Referring to the legislative history of the act, and speaking of the scheme of the regulation intended by the Natural Gas Act, the Supreme Court said, in *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, *supra*, at page 467:

"It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong. 2d Sess. pp. 1-3; H. Rep. No. 709, 75th Cong. 1st Sess. pp. 1-4; Sen. Rep. No. 1162, 75th Cong. 1st Sess." (Our italics.)

Inferentially this means that those transactions over which jurisdiction was not given to the Federal Power Commission may be considered as local matters and left to state regulatory bodies. And again we remember that among transactions not included in the act are direct sales to large industrial consumers.

Report No. 709, 75th Cong., 1st Sess., referred to in the quotation from the United Fuel Gas Co. case, reads as follows:

" . . . If enacted, the present bill would for the first time provide for the regulation of natural-gas companies transporting and selling natural gas in interstate commerce. It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of Congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23). There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri v. Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Service Commission v. Attleboro Steam & Electric Co.* (1927), 273 U. S. 83). The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act . . . " (Our italics.)

This language of the report clearly indicates the intent of Congress. It clearly indicates that the only sales to be regulated under the provisions of the bill were sales to local distributing utilities for resale. Failure to include sales direct to large industrial consumers indicates the thought upon the part of Congress that uniformity is not required

in such sales and that they are so local in nature as properly to be left to state regulation.

We seem to have all the prerequisites to state intervention. Congress has not elected to exercise its power under the commerce clause. Uniformity in control of direct sales from interstate pipe lines to large industrial consumers does not seem to be necessary. There is nothing in the record to indicate that it is. Conditions will differ from area to area and the varying needs will be met by varying procedures. Furthermore, the fact that there has been no uniformity, so far as the record shows, up to this time, and the additional fact that Congress rather deliberately left regulation of such sales out of its regulatory scheme are also indicative that uniformity is not necessary, or at least that Congress did not believe it to be necessary after investigation and reports by the Federal Trade Commission and hearings upon the bill, in which we may assume that the pertinent facts, with reference to character of regulation needed, were developed. It would also seem that Congress did not believe the national interest in the regulation of such business outweighed local needs, and the logic of the situation seems to support such position. The State of Indiana, in its scheme of utility regulation, controls sales to all other consumers of gas brought into Indiana through interstate pipe lines. The sales by local distribution utilities are regulated by the state. The record shows that many industrial consumers are thus provided with natural gas derived from exactly the same source. If sales to some are regulated by the State and others are free from regulation confusion is natural.

Also if Indiana may not regulate the sale of natural gas from interstate pipe lines direct to large industrial consumers in Indiana, such sales and deliveries will not be regulated at all under present law. The result will not only be that the pipe line owners, free of regulation, will have advantage over regulated local utilities in competing for business from large industrial consumers, but the customers of the pipe line may be given advantage over the customers of the local utilities. Local utilities whose costs per unit of gas have been increased by the reduced volume

of sales caused by the direct deliveries from the pipe lines will be entitled to higher rates and resulting price disparity unfavorable to customers of the local utilities will tend to break down the state system of regulation which will have fixed, and appear to be responsible for, the unfavorable local rates. This probable result, it seems to us, is a weighty consideration in balancing national interest against local need.

While the exact question now before this court has never been decided by the Supreme Court of the United States, cases have been cited which seem to us to be persuasive.

In the cases of *Public Utilities Co. v. Landon*, *supra*, *Pennsylvania Gas Co. v. Public Service Commission*, *supra*, *East Ohio Gas Co. v. Tax Commission*, *supra*, and *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, *supra*, deliveries of natural gas to consumers were held to be so local in nature as to permit state regulation and control.

The Landon case, the Pennsylvania Gas Company case and the East Ohio Gas Company case all held that gas taken from interstate pipe lines and delivered to consumers was subject to state regulation. It is true that these cases all involve sales in municipalities but the fact remains that the gas was all interstate gas and flowed directly from the points where captured through interstate pipe lines and distribution systems to consumers. In the Landon case service to consumers was not directly from the pipe line. There was an intervening distributing company. But in the other two cases gas was supplied to consumers by the pipe line company using distribution systems owned by it directly from sources outside the state. In all three cases the business was held to be so local in nature as to permit state interference by taxation or regulation. The Supreme Court, in later cases, seems to us to have indicated that the resulting in the Pennsylvania Gas Co. case was predicated largely upon the fact that the sales involved were to consumers. *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, p. 505, *supra*, *Jersey Central Power & Light Co. v. Federal Power Commission* (1943), 319 U. S. 61, 80 L. Ed. 1258. In the Barrett case, which did not involve sales to consumers but to distributing companies for resale, the

Landon case and the Pennsylvania Gas Company case were discussed and it was said, on p. 309 of 265 U. S.:

"In both cases the things done were local, and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the Landon Case. The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state, and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance. . . ."

By this language the Supreme Court of the United States seems to us to indicate that the test is whether or not local business is involved and that supplying local consumers is a local business. It does not seem to be material whether the service is by the transporting company or by an independent distributing company. In the case before us the sales are and will be to local customers for their own consumption. Therefore, paraphrasing the language quoted, the local interest is paramount and interference with interstate commerce, if any, is of minor importance and permissible.

In the case of *Southern Natural Gas Corp. v. Alabama*, *supra*, the validity of a franchise tax on a pipe line company was involved. The pipe line company furnished natural gas to three distributing utilities and this business was, of course, interstate under the Natural Gas Act and the decisions we have already cited. It also distributed gas directly to one large industrial consumer. The gas to this consumer was delivered in continuous movement from out-state gas fields. The court held that the tax was valid and in doing so indicated that the sale of gas to the one industrial consumer was so local or intrastate in nature as to justify the tax, which could not be imposed if the pipe line company was engaged only in interstate commerce.

There are many other cases cited by the parties on this phase of the case which have been helpful in reaching our

conclusion. We have examined all of them, but discussion of more of them would only unnecessarily further prolong this opinion.

We may add in connection with our comment on the decided cases that we have had in mind that taxation by a state and the exercise of its police power are not always justified by the same facts. It very recently has been said by the Supreme Court of the United States (*Freeman v. Hewit*, decided December 16, 1946) that state taxation of local aspects of interstate commerce will be more carefully scrutinized and more consistently resisted than state regulation under the police power. After weighing the competing State and Federal interests interference with local phases of interstate commerce by regulation may be allowed when interference by taxation would not be. It is pointed out that there are always other sources from which revenue may be derived by taxation and that revenue serves as well no matter what its source, whereas, as said by the Court in the *Freeman v. Hewit* case, *supra*, "... A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State. *The Minnesota Rate Cases*, 230 U. S. 352, 402 et seq.; *S. C. Hwy. Dept. v. Barnwell Bros.*, 303 U. S. 177; *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 209-12 . . ."

This leniency toward the police power as compared with the taxing power of the states inures to the benefit of appellants in the case before us, not only in considering the merits of the differences involved but in weighing the value of the decided cases as precedents.

Suggestion is made by appellee, but not very vigorously urged, that it is not a public utility in its service direct to large industrial consumers in Indiana, and is, therefore, not subject to regulation in connection with such service. By the Natural Gas Act (§1 (a)) it appears that the natural gas business had been investigated by the Federal Trade Commission and reports had been made to Congress, and upon the basis of such investigation and reports Congress declared that the business of transporting and selling natural gas for ultimate distribution to the public is af-

affected with a public interest, and it is traditionally accepted that any business affected with a public interest is subject to regulation and control.

We also have an Indiana statute which defines a public utility, subject to control of the Indiana Public Service Commission, to be "... every corporation . . . , that now or hereafter may own, operate or control any . . . plant or equipment . . . for the . . . transmission, delivery or furnishing of heat, light, water or power . . . either directly or indirectly to or for the public . . . " § 54,105 Burns' 1933.

Another Indiana Statute became law on February 26, 1945, before the orders involved in this action were made by the Indiana Public Service Commission. Acts of 1945, Chap. 53, p. 110. This act adds an additional section to the Indiana Public Service Commission Act aimed directly at the natural gas business, and by the act a "gas utility" was defined to mean and include "any public utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the State of Indiana for his, its or their domestic, commercial or industrial use." Certainly appellee is selling and proposing to sell gas directly to consumers in Indiana.

The bottom question on this phase of the case is whether the appellee is furnishing gas in Indiana directly or indirectly to or for the public. Admittedly it is selling gas in Indiana indirectly to and for the public through distributing companies and that makes it a public utility under the Indiana statute, subject to regulation and control by the Indiana Public Service Commission. Also admittedly it is selling and proposing to sell gas directly to consumers within the state. This part of its business and its interstate transportation and its sales to local distributing utilities are so integrated that in any practical consideration of the state's right to regulate direct sales to consumers that activity must be appraised as a part of its entire business in Indiana. Its rights and duties, with reference to such direct sales, must be determined in the light of its over-all character in the State of Indiana. It will compete with local activities in soliciting industrial business and will be in position to discriminate in its service and in its rates and

in its regulations. This freedom is inconsistent with all concepts of the duties and obligations of a person or corporation engaged in such business.

The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. *United Fuel Gas Co. v. Railroad Commission* (1929), 278 U. S. 300, 309, 73 Ed. 390, 396; *Industrial Gas Co. v. Public Utilities Commission of Ohio* (1939), 135 Ohio St. 408, 21 N. E. (2d) 166, 168. From the last named case, we quote the following:

"It may well be urged that a corporation, calculated to compete with public utilities and take away business from them, should be under like regulatory restriction if effective governmental supervision is to be maintained. Actual or potential competition with other corporations whose business is clothed with a public interest is a factor to be considered; otherwise corporations could be organized to operate like appellant and in competition with bona fide utilities until the whole state would be honey-combed with them and public regulation would become a sham and delusion.

"What appellant seeks to do is to pick out certain industrial consumers in select territory and serve them under special contracts to the exclusion of all others except such private or domestic consumers as may suit its convenience and advantage. There were other industrial consumers with whom the appellant refused or failed to agree and so did not serve them. If such consumers were served at all, it must necessarily be by a competitor. If a business so carried on may escape public regulation then there would seem to be no valid reason why appellant may not extend the service to double, triple or many times the number now served without being amenable to regulative measures."

The law, as declared in *Industrial Gas Company v. Public Utilities Commission of Ohio*, *supra*, seems to us fair,

reasonable and logical and, when applied to the facts in the case before us, leaves appellee unquestionably in the position of a public utility subject to regulation.

The same thought which was behind the Ohio case, just cited and quoted, with which thought we agree, was also incorporated in *Re Potter Development Co.* (1939), 32 P. U. R., N. S. 45, decided by the Public Service Commission of New York. In that case, the Potter Company sold natural gas to the Corning Glass Works. The Potter Company obtained its gas from an interstate transmission line and piped it to the Corning Glass Works, which is located in the City of Corning, New York. The Glass Works was the only customer served by the Potter Company, but the interstate pipe line also furnished gas to an affiliate which, as a public utility, operated the gas distribution system in the City of Corning. There was a proceeding to determine whether the Potter Company was a public utility subject to regulation by the New York Public Service Commission. The Commission held that it was, and, in support of its holding, argued that to hold otherwise would invite widespread circumvention of the Public Service law and would result in a multitude of companies supplying gas under special contracts in competition with public utilities and indicated that such a situation would be intolerable.

Reversed with instructions to enter judgment denying plaintiff the relief sought.

EMMERT, J. not participating.

APPENDIX "B"**OPINION OF RANDOLPH CIRCUIT COURT**

In the Randolph Circuit Court, May Term, 1946

May 11, 1946

No. 5440

PANHANDLE EASTERN PIPE LINE COMPANY

vs.

THE PUBLIC SERVICE COMMISSION OF INDIANA

Macy, J.:

[The plaintiff seeks to vacate, set aside and enjoin the enforcement of an order of the Public Service Commission of Indiana entered November 21, 1945, and an order supplemental thereto, dated April 9, 1946. These orders were made after a hearing pursuant to proceedings initiated by the Commission, and plaintiff was a party to these proceedings. The original finding of the Commission contained the following:

"Nor is any issue presently involved as to any specific regulatory action by the Commission over the rates or service of Panhandle in Indiana in the case of sales direct to Indiana consumers other than the requiring of the filing of tariffs and reports. The fundamental question is whether the direct consumer sales of Panhandle are subject to regulation by this Commission in any respect."

"The Commission concludes that the distribution in Indiana by Panhandle of natural gas direct to consumers is subject to regulation by this Commission under the laws of this State."

This finding was followed by an order that plaintiff file with the Commission tariffs covering rates, rules and regulations appertaining to any and all sales of natural gas by

it direct to ultimate consumers within the State of Indiana, an annual report for the years 1942, 1943, 1944 and each year thereafter as the same become due and so long as it continues to distribute gas direct to any consumer in Indiana, and file copies of its statements, filed with the Federal Power Commission. At the trial in this Court it was urged on behalf of the Commission that it might desire that such data be filed solely for purposes of information, whereupon plaintiff offered to furnish some for such purpose only and asked the Commission to modify its order insofar as it asserted any regulatory authority over plaintiff's sale to industrial consumers. This offer was rejected, such a conditional filing was declared to be no compliance with the order, and the Commission in its supplemental finding and order affirmed its purpose to use the information for all purpose required by the public service Commission Act, including the regulation of rates and service appertaining to the supplying of natural gas by Panhandle direct to consumers within the State of Indiana.

It will not serve any useful purpose to recite the facts involved in this proceeding; they have all been thoroughly discussed in oral argument and in the briefs and there is no disagreement as to any question of fact. I shall take up the law questions involved, in the order in which it seems to me they ought logically to be considered. The briefs of all the parties, plaintiff and defendant, the intervenors and the amicus curiae, have been of great help, for which the Court is very thankful.

First, the Court does not believe it is material whether plaintiff is held to be a public utility within the definition of that term found in Sec. 54-105 B. R.-S. (1933) or whether under Sec. 4-603 plaintiff could be granted a franchise to operate a utility in Indiana. If plaintiff's business is interstate commerce, and if it lacks those local characteristics necessary to give the State the power to regulate it, then the State could not create any such power by legislation.

Next, does the State, thru the defendant Commission, assert the power to regulate it, and may the order of the Commission be so interpreted that, assuming that an at-

tempt to regulate plaintiff's business would be void, we may reasonably conclude the Commission proposes no such action. Because, unless it appears from the order that the Commission asserts regulatory jurisdiction and authority, and has ordered the filing of informative data as the first step in the process of regulation, then the Court should not in any event hold the order void, and questions of interstate commerce and local interest need not be considered.

The case of *Arkansas Louisiana Gas Co. v. Dept. of Public Utilities*, 58 S. Ct. 770 approaches, but does not decide, the precise question, because there the company which brought the gas into Arkansas exercised three functions: (1) delivery to selected industries for consumption; (2) delivery to public utilities for resale, and (3) distribution, as a public utility through a separate department. Since the operation was clearly both local and interstate, the information called for might be needed and would not materially burden or unduly interfere with the free flow of commerce between the States, and the Court declined to pass on the Constitutional question.

Obviously, the Court did not consider that the Arkansas Commission had taken any step designed to regulate rates or service as to the interstate business.

In the *Slattery* case, 58 S. Ct. 299 injunction was refused because the Commission's order was not the first step in the direction of unconstitutional action, and because the Appellant had not asked the Commission to modify or limit its order and had not exhausted its remedy before the Commission. The Court said: "It will be time enough to challenge such action when it is taken or at least threatened."

In the *Public Utilities Commission v. United Fuel and Gas* case in 58 S. Ct. 369, the pipe line company admitted the right of the Commission to call for evidence for certain informative purposes, but denied the power of the Commission to fix rates; it offered the evidence on that basis, but the Commission refused it, and repeated its assertion of jurisdiction, whereupon the pipe line company sought injunction. While the case was pending, the Natural Gas Act was passed, and since the pipe line company was delivering its gas to a local distributing Company, the Fed-

eral Power Commission had sole jurisdiction over its rates. Therefore, the State Commission was without the jurisdiction which it asserted. Since the order was invalid, and the pipe line company had exhausted all administrative remedies before resort to the Court, and since the Commission had refused to eliminate from its order those provisions in conflict with the Federal act, the injunction was granted against enforcement.

While this case does not pass on the question whether the Commerce clause of its own force would invalidate the Commission's assertion of jurisdiction, it indicates that if the Commission's order asserts and proposes to exercise a regulatory power which is denied to the State because it conflicts with the federal law (whether by Act of Congress enacted in aid of the Commerce clause or by force of the Commerce clause itself would not seem material) then the party affected by such order need not wait until actual regulation is imposed. Indeed, this would seem in harmony with the Indiana Act which provides that any corporation adversely affected by any decision, ruling, order, determination, requirement or direction of the Commission may commence an action in the Circuit Court to vacate or set aside or enjoin the enforcement of the same on the ground that it is insufficient, unreasonable or unlawful. B. R. S. 54-429. The question presented here is whether the decision, ruling, order, determination, requirement and direction of the Commission is unlawful, and it seems clear to the Court that the plaintiff should not be compelled to furnish the Commission with all the information required, knowing that the Commission proposes to use it in regulating rates and service, and wait until a regulation is actually announced, before it can test the lawfulness of the order. It is not a question of testing an order to determine whether its results will be unreasonable or arbitrary or confiscatory, but whether the Commission had any power to make any order upon the particular subject. Such a question should be decided at the threshold. While it was argued, both orally and in the briefs, for the Commission that the action here is premature because the Commission might want the date for informative purposes only, yet in view of its original declaration that the "distribu-

tion" of natural gas direct to consumers is subject to regulation by this Commission, supplemented by its declaration that the information is to be used in and in connection with the regulation of rates and service appertaining to the supplying of natural gas by Panhandle direct to consumers, etc., it would appear that such a position is now wholly untenable.

Such being the Court's view of the law, the next question is whether the direct sales of gas to Anchor Hocking form a part of interstate commerce. There is a direct, continuous and unbroken flow of gas from the field in Texas to the factory in Indiana; the sale is by contract and the service is interruptible by Panhandle; measured by every available definition of the term, the sales to Anchor Hocking are wholesale, the general test being that of volume, or quantity; and "wholesale" being applied to sales of goods or merchandise to trading establishments, institutions, industries, etc., as distinguished from sales for personal or household consumption. See *Roland Electrical Co. vs. Walling*, 66 S. Ct. 413-421. The sale to Anchor Hocking is the termination of the interstate movement, i. e. it is made at the points where the parties originally intended that the movement should end. The interstate movement stops when the gas finally reaches Anchor Hocking lines. To say that the interstate character of the movement ceases the moment pressure is reduced seems to the Court a highly artificial process of reasoning. If that were true, then Congress was without authority to take jurisdiction over the sales to utilities for resale; it is not possible for the Court to follow the movement of the gas in the main line, at 200 pounds pressure, thru a regulator where its pressure is reduced to 100 pounds and say that it is still in interstate movement, but that when this line divides, and the pressure in each branch is reduced to 90 pounds, that which flows into the branch leading to the Indiana Ohio Public Service Company is still in interstate movement while that which flows into the branch leading to the Anchor Hocking Glass Company is in intrastate movement. Congress regulates the one sale because it is interstate and if it had chosen to regulate the other the Court does not believe it would have been urged seriously that it was intrastate. Highly re-

finer processes of reasoning are frequently used to justify a desired result, and some court may be able to convince itself that such a transaction as that here involved is an intrastate transaction; this court has been unable to complicate and confuse the problem sufficiently to arrive at such a conclusion. If, as the Court said in *Colorado Wyoming Gas Co. vs. Federal Power Commission*, 65 Sup. Ct. 850, sales in interstate commerce do not end until the gas enters the service pipes of the distributing company, I see no reason why, when destined to a factory, they should end until they reach the service pipes of the factory. I can see no reason, altho the distinction may be arbitrarily made, for believing that a sale for consumption is intrastate, while a sale for resale is interstate. Nor is the Court able to even comprehend the idea that the delivery of the gas in Indiana is an intrastate transaction altho the transportation up to the point of delivery is interstate. The sale is all by contract, delivery is part of the terms of the sale, the ultimate goal of the transportation is the delivery of the goods without which there would be no transportation; commerce implies buying and selling. This branch of the problem seems too simple to get confused about, although in stating it this way the Court is aware of the pitfalls of over-simplification against which we have recently been warned by high authority.

Before passing to the question which remains, it will be proper to state that the Court assumes that all parties agree to the proposition that any effort by the State to enforce a selling price on goods moving in interstate commerce places a direct burden on interstate commerce with that freedom which it was the purpose of the commerce clause to preserve.

Simpson vs. Shephard, 33 S. Ct. 729;

Public Utilities Comm. vs. Attleboro, 47 S. Ct. 294.

But assuming that the sales here involved are in interstate commerce, and that Congress has not acted to prevent State regulation, are the transactions of such character that the State may not, i. e. May the State regulate rates and service as long as Congress does not choose to enter the field?

The Court is asked to determine what the intent of Congress was in enacting the Natural Gas Act (Title 15 USCA Par. 717 et seq. and 717 f, Suppl.) and by reference to remarks made when the legislation was under consideration to conclude that Congress believed that all sales for consumption were subject to state regulation, it having been so held in the Pennsylvania Gas case. The Court has carefully read the act and finds no ambiguity in it. It does not seem therefore, that we can resort to extraneous matters to determine the legislative intent, or to consider what this witness or that thought or said he thought the law was when testifying before the legislative Committee, or what the Committee having the bill in charge said in its report when it presented the bill for passage. The Act as a whole is clear and must be held to express the intent of Congress as it stands. Authorities in support of this view of the law are numerous, and some are cited in the briefs, so that repetition here is unnecessary.

It is also urged that Congress, by saying nothing on the subject of direct interstate sales to industrial consumers, should be held to have thereby assented to State regulation of such transactions. The Court's view, obtained from the authorities, is this:- that the grant of power contained in the Constitution establishes the immunity of the commerce from direct control of the States; if, embraced within the grant there are subjects of such nature that it is not possible to derive from the Constitutional grant an intention that they should remain uncontrolled until Congress acts, and if they are matters of local concern, the States may extend their powers as to such subjects. Where the subject is National in character, admitting and requiring uniformity of regulation, affecting alike all the States, Congress alone can provide the needed regulations, and in such cases the failure of Congress to act is tantamount to a declaration that the subject shall be free from regulation. By the Constitution the people gave to Congress the power to regulate commerce within the several states; if Congress has failed to legislate upon any particular subject within that grant, the question is whether the subject is so affected with a local, rather than a National interest that Congress must have necessarily felt that the States

✓ Rather than the Federal Government, should regulate them, then the power of the States to regulate that subject will be inferred from the failure of Congress to act. Numerous examples of the application of this principle are cited and discussed in the briefs. So it appears that there can be no understanding of the principle of Congressional silence without an understanding of the nature of the subject which it is claimed is affected thereby. In the case at bar, that subject is the interstate transportation, sale and delivery of natural gas to an industrial consumer, in whole-sale quantities, under contract.

Counsel for all parties, and the *amicus curiae* have so thoroughly discussed the many cases having or appearing to have some bearing on the real question involved here, that it would serve no purpose to again discuss them, but it is only fair to counsel that the Court mention some of these cases which seem to best expound the principles which must be applied in deciding this case.

The Landon case in 39 S. Ct. 268 involved the transportation of gas through pipe lines from one State to another, and its sale at destination to local distributing companies. The Court held that the interstate character of the transaction up to that point could not be doubted, but that the subsequent sale of the gas by the distributing companies, to consumers at retail and in due course of their own local business was no part of interstate commerce. (Decided 3-17-1919)

The Pennsylvania Gas case involved transportation of gas from Pennsylvania into New York, where distribution and supply to ultimate consumers in the City of Jamestown was effected by the transporting company, the service being similar to that of a local plant furnishing gas to consumers in a city. Justice Day, in deciding the case, said the transmission being direct, without intervention between buyer and seller, was a transmission in interstate commerce, but the local service was not of that character which requires general and uniform regulation of rates by Congressional action, and while local rates might affect the interstate business of the Company yet the State might make local regulations of a reasonable character. The power of the Public Service Commission to regulate rates for such local service was upheld. 40 S. Ct. 279. (Decided 3-1-1920.)

I do not understand this case to rest entirely on the fact that the sales were to ultimate consumers, or to decide that the line of demarcation between local interest and national interest depends on whether the sale is to ultimate consumers, residents of the State, or to a distributing Company for resale. The first phase of the Court's opinion distinguishes the case, on its facts, from the Landon case, where the interstate movement ended when the gas passed into the local mains for distribution; this phase of the opinion is only the Court's introduction to a holding that in the case before it the gas is transported directly to the consumers without any intervention between seller and buyer and the transaction is therefore interstate. The Court then proceeds to discuss the power of the State to regulate, altho part of an interstate transmission, the furnishing of the gas to local consumers, on the ground that it is local in character, is required in the public interest, and has not been attempted by Congress. The facts the Court considers in determining that the business is the subject of State regulation are that "the service is essentially local, and the sale of gas is to local consumers who are reached by the use of the streets of the City in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city." It seems to the Court that *all* of these facts, not the single one that the sale is to *ultimate consumers*, entered into the Court's finding that the business might be regulated by the State.

The case of *State ex rel., Barrett vs. Kansas, etc.*, 44 S. Ct. 544 (decided May 26th, 1924) denied the power of a State Commission to regulate wholesale prices of gas transported in interstate commerce. In so doing the Court remarked that the line of division between cases where in the absence of Congressional action, the State is authorized to act, and those where State action is precluded by mere force of the Commerce Clause of the Constitution, is not always clearly marked; that in the absence of Congressional legislation a state may impose taxes, enact inspection laws, quarantine laws and generally, laws of internal police, although they may have an incidental effect upon interstate

commerce. But (quoting from the Minnesota Rate Case) if a state enactment imposes a direct burden upon interstate commerce, it must fall because the State may not directly restrain that which in the absence of Federal regulation should be free. It is contended that public interest requires that the business be regulated, yet Congress by its silence in effect declares the commerce shall remain free of regulation. The Court further points out that the Pennsylvania case is distinguishable because there the gas after reaching destination, was subdivided and sold at retail and the service to consumers was essentially local. Finally, the Court says that the business of supplying, on demand, local consumers is a local business, regardless of whether the distribution is made by the transporting company or by independent distributing companies. But here the gas is sold in wholesale quantities, not to consumers but to distributing companies for resale to consumers, etc., hence the paramount interest is not local but National, requiring uniformity of regulation, even tho it be the uniformity of governmental nonaction, to preserve equality of opportunity and treatment among the various communities and States concerned.

On January 3rd, 1927 the Supreme Court decided the Attleboro Case (47 S. Ct. 294) which, while it deals with electricity instead of gas, reiterates the principle of the previously noted cases, that sale of electric current generated in one State and delivered to a purchaser in another is a transaction in interstate commerce; that the latter State has no authority to fix the price at which the generating company must sell current to the receiving company, and any attempt to do so must fail by force of the commerce clause regardless of its purpose. In support of the State's power to regulate these rates it was urged that the distributing company's rate could not be effectively regulated without regulating the original sale price of the current, that the high cost of the latter was necessarily passed on to the ultimate consumers and therefore it became a matter essentially local, affecting interstate commerce only indirectly. This argument was rejected by the court, after a careful review of the Pennsylvania and Kansas gas cases.

On May 18th, 1931 the Supreme Court, in the East Ohio Gas case (51 S. Ct. 499) reiterated the principles of the

Landon, Kansas Gas and Attleboro cases, and explained the distinction between the interstate transaction, not subject to State regulation, and the subsequent distribution by the numerous small service lines and pipes, where the gas is held ready to serve as needed, comparing the process to the breaking of an original package in order that its contents may be prepared and sold at retail. The latter process is declared to be not interstate commerce, but a business of purely local concern, exclusively within the jurisdiction of the State, and the opinion in the Pennsylvania Gas case to the extent that it may conflict with such holding, is disapproved.

The Cities Service case reported in 85 S. W. 890 (1935) discusses the foregoing cases and holds that transportation and delivery of gas from one state directly to an industrial consumer in another pursuant to contract and in continuous movement, is interstate commerce and the State Commission has no jurisdiction over the same.

From these authorities it appears that at the time Congress started consideration of Federal legislation on the subject in 1935, the courts had laid down certain pretty well defined rules for both Federal and State legislature to go by. It had been made clear that the State could not regulate rates and service as long as the service was interstate, tho they could adopt certain local regulations of such reasonable character as not to impose any direct burden on the commerce. It has been made equally clear that once the interstate movement came to rest at its destination, the subsequent distribution to consumers within the State would be intrastate and subject to State regulation, and it had been clearly held that if the transporting company chose to break up its interstate shipment and hold same in service lines and pipes ready to move forward for consumption as needed that would be a local transaction that the State could regulate. That there were in existence at the time Congress acted many instances where the gas was piped directly to industrial consumers and delivered, not on demand, but under contract, is evident; that Congress could have expressly assumed regulatory jurisdiction of such transactions is likewise evident, and that it did not choose

to do so is clear from the Act itself. Nor do I find that such industrial sales were actually being regulated by the States, altho, as noted, regulation had been at times attempted.

The *Southern vs. Alabama* case was decided in 1937 (57 S. Ct. 696). There the interstate carrier had four customers in Alabama, three being public utilities and the fourth an industrial consumer. There was a continuous movement from the wells in Louisiana to the point of delivery in Alabama, where it was reduced in pressure, measured for purpose of effecting delivery and transported thru the seller's service pipes to various widely separated plants of the consumer, where it was finally delivered. The seller maintained an office in Alabama where orders were taken from time to time for the gas as required by the Industry. The Court perceived no essential difference between the establishment of such a local activity to meet the needs of consumers in industrial plants and the service to consumers in the municipalities which was found in the Ohio case to constitute an intrastate business, and upon that basis sustained a franchise tax for privilege of doing an intrastate business, which tax the Court found to be of such character that it did not discriminate against interstate commerce or otherwise lay a direct burden upon it.

After the passage of the Natural Gas Act the Illinois Commerce Commission attempted to regulate the service of Illinois Natural Gas Co. This company maintained lateral transmission lines in Illinois, which received Gas from Panhandle at points in Illinois, pressure being reduced at such points. This gas was then delivered at further reduced pressure, to various local public utilities which in turn delivered it to the consuming public. The Illinois Supreme Court discussed the East Ohio, Kansas Gas, Attleboro and Alabama cases, and decided that the local interest was paramount and the national interest of minor importance, noting that the Commission made no effort to regulate the transmission or delivery until the gas had left the high pressure lines, its pressure reduced, and delivered to the intrastate lines ready for delivery to intrastate utilities. It held that the Natural Gas Act, being effective only over

interstate commerce, did not apply. (See 32 N. E. (2d) 157.)

This case was finally decided by the Supreme Court (1-5-42; 62 S. Ct. 384); the opinion pointed out that in the *Southern Gas vs. Alabama* case "on which the Illinois Supreme Court relied, we held only that the sale of gas to a local industrial consumer by one who was piping the gas into the State was a local business sufficient to sustain a franchise tax on the privilege of doing business within the State, measured by all the taxpayer's property located there, including that used for wholesale distribution of gas to local public service companies." The Court holds that the Natural Gas Act gives to the Federal Power Commission sole jurisdiction over such matters as the extension of facilities and denies to the Illinois Commission any regulatory power over the same. Upon what principle would the Court have relied in the absence of the Federal Act, the mechanical test or a balancing of the interest of the State against the effect the regulation would have on the commerce in its National aspect? The Court poses the question and with evident satisfaction notes that no answer is required.

At this point it is well to note that the Court in the *Hope Gas Co.* case, decided 1-3-1944 and reported in 64 S. Ct. 281, quoting from the *Illinois Gas* case, *supra*, gave its interpretation of the purpose of the Federal Act as being to occupy the field in which the *Kansas* case and the *Attleboro* case had held the States might not act, taking no authority from State Commissions, and complementing the regulatory authority of the States. State Commissions were thwarted in local regulations because they could not discover what it cost interstate pipe-line companies to deliver gas within the consuming states.

It must be observed that the cases mentioned in these remarks by the Court were not concerned with direct sales to industrial consumers, and that since the enactment of the Federal Act State Commissions are able to obtain all necessary cost figures from the Federal Commission. I do not find in any of these cases any interest being manifest in the industrial consumer or in the effect industrial sales,

service and rates have or may have on the states, or their citizens or their public utilities.

In a matter such as we are concerned with here, one might expect to extract from the language of some opinion of the Supreme Court some dictum indicating that the Court conceded, or assumed, or thought everyone else assumed, that the States were regulating or had the right to regulate such direct sales to industrial consumers, and there are some cases which to one of an optimistic turn of mind, might be thought helpful.

In the *Panhandle* case in 65 S. Ct. 821 (4-2-1945) the Federal Power Commission was concerned with fixing rates for sales to distributing companies, and it is made clear by the Court that while the Commission may not fix industrial rates, it may take those rates into consideration when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction.

Whether the case of *Colorado Co. vs. Federal Power Commission*, 65 S. Ct. 829 (also decided 4-2-1945) clarifies or only further confuses the matter, is debatable. It does expressly recognize three distinct types of business: (a) intrastate transportation and sale; (b) interstate transportation and sale to industrial users; and (c) interstate transportation to distributing companies for resale. It repeatedly refers to (c) as a wholesale transaction, altho from the date referred to it is evident that that term must have been used merely as a convenient means of designation, for the direct sales to one industry alone were greater than the amount of gas consumed by all the inhabitants of Denver. The opinion refers to the industrial business as an unregulated business (neither the State of Colorado nor the Federal Power Commission having attempted to regulate it) and finds that the price was a bargained one, arrived at thru competition with other fuels. (The *Colorado Wyoming Gas* case, decided the same day, 65 S. Ct. 850, is of interest because it reaffirms the doctrine of the earlier cases, viz: that the interstate commerce does not end until the gas enters the service pipes of the distributing companies.)

In the *Southern Pacific Co. vs. Arizona* case, 65 S. Ct. 1515 (decided June 18, 1945) the Court, recognizing the power of the State to make laws governing matters of local

concern, altho in some measure they might affect or even regulate interstate commerce, warned that this does not include the power to impede substantially the free flow of commerce, or to regulate those phases of the National commerce which because of the need of national uniformity, demand that if there is to be any regulation, it should be by a single authority. It is not important whether this distribution of power between State and National Governments is based on the commerce clause itself, or on the presumed intention of Congress, where Congress has not spoken. Some enactments are plainly within and others plainly without the State power, and between these are the numerous cases where regulation of local matters may also operate as a regulation of interstate commerce. As to these, we can only reconcile the conflicting claims by appraisal and accommodations of the competing demands of the State and National interests involved. The commerce clause itself affords protection from State legislation inimical to the National Commerce, and the Court and not the State legislature is the final arbiter of these competing demands.

Altho many more cases have been examined by the Court, only two more will be cited.

The first, *Sioux City vs. Missouri Valley Co.*, 46 Fed. 2nd 819, was decided in 1931 and in some respects is in point here. It is quoted at length in plaintiff's brief but does not receive honorable mention in the others, presumably because it is not concerned with regulation, and is a lower court decision. The Judge who decided it carefully reviewed the *Landon* and *Pennsylvania* cases, and weighed the facts to determine whether the particular transaction involved was National in its character and therefore free, or local in its character and therefore subject to local regulation until Congress should see fit to act. The Court finally posed the question: May they (the Industries) purchase gas in interstate commerce and have it brought in for their own consumption under particular and private contracts with a concern engaged in such interstate commerce but not engaged in any local public business? And answered it in the affirmative. The point in issue was the right of the City to require the pipe line company to obtain the consent of the city before laying its pipe over a bridge into the City and

the Court denied such right solely on the ground that it would be a direct burden on interstate commerce.

The other case is *Columbia Gas and Electric vs. United States*, 151 F. (2d) 461 where, in discussing the operation of plaintiff and its subsidiaries, the Court said: "Columbia was engaged in the production, transmission and sale of natural gas to both industrial and domestic consumers in Kentucky, West Virginia, Ohio, Indiana and other states. The Columbia subsidiaries served both domestic and industrial consumers and so were public utilities subject to the rules and regulations of State Public Utilities Commissions and the provisions of municipal franchises under which they operated. The result was that they could not contract with industries at fixed rates for definite periods because of the power of State and Municipal Authorities to change their rates and to require them to give preference to domestic consumers when gas was insufficient for both. The subsidiaries of American Fuel served only industrial users under private agreements, and all plans for expansion of the American Fuel System contemplated strict adherence to that policy. Being free from constraint by municipal franchises and state regulations, they had a substantial competitive advantage over Columbia whenever they came into competition with it." Later on in the opinion the Court says: "Columbia was fully conscious of the threat . . . that these organizations would present with the competitive advantage afforded by their immunity from State and Municipal regulation."

This Court has searched diligently for authority upon which the power asserted by the Public Service Commission might be upheld, but if such power exists it will have to be discovered by some intelligence more acute than that to which the parties here have submitted this controversy. If the rule were that Congress, by failing to legislate on interstate sales to industrial users, must be held to have tacitly conferred upon the States jurisdiction in such matters, there would be no difficulty here, but that clearly is not the rule unless we can say that the business is so affected with a local, rather than a National interest that the States, rather than the Federal Government should regulate it. It is that predominant local interest that this Court is unable

to see. That the transaction here belongs to interstate commerce and therefore to the National Government seems clear; that the State proposes to regulate rates is established; that rate regulation is considered by the Courts to be the imposition of a direct burden, or restraint, is conceded, and that for the State to impose a direct burden on interstate commerce is forbidden is not open to argument. If Congress considers that each state should have the right to impose its own regulations on this industrial business, it can say so, or if it determines that this business should be brought under the control of the Federal Power Commission it can do that; but in the meantime the State must not exercise powers which belong exclusively to Congress.

The constitutionality of the Commission's acts is to be determined solely by reference to the limits imposed by the Constitution; the question is not whether regulation is needed, or advisable in the public interest, but is one of power. From the Commerce Clause of the Constitution itself, the Supreme Court decisions, the discussions and reports in Congress, and the provisions of the Natural Gas Act itself, the conclusion seems reasonable that at the time Congress passed the Act it was not concerned about industrial sales and with any effect they might have on the utilities engaged in distribution, and did not consider that by its silence it was authorizing the States to regulate them.

The people, by giving Congress exclusive power to regulate interstate commerce, left it free of all restraint except that which Congress might impose or permit the States to impose. So, if the matter is one that ought to be under the control of one authority, and Congress does nothing, then nothing can be done.

It would seem that importation of goods from one State to another is a National matter, and if it is to be regulated, Congress should do it.

It is here urged that it is of great importance to the local consumers that Panhandle be not permitted to raid the utilities by taking away their industrial consumers. Granting this, yet the high desirability of regulation cannot create the power to make it, and it seems the more logical view of the matter to urge that since these transactions spread from Oklahoma and Texas, thru Kansas, Missouri,

Illinois, Indiana, Ohio and Michigan, each one of which states would presumably be interested in looking to the welfare of its own consuming public, and since the industries supplied are themselves engaged in interstate commerce, a National, rather than a local problem, is presented, and it would be greatly complicated by the imposition of as many sets of rates and regulations as there are State Commissions to impose them. State regulation might prevent discrimination as between communities within the State, and it might protect the private consumers who buy gas from the various local utilities, by regulating the price the industrial consumers should pay as well as the quantities they should be allowed to use, and perhaps in other ways, but how could it preserve equality of opportunity and treatment among the various States concerned? In the competition between the demands and requirements of one State and those of all the States concerned, how can there be any adjustment except it be made by one authority? It seems to the Court that this problem is one requiring uniformity of control, if it is to be controlled, and that to permit the State of Indiana to do what it here proposes, viz: regulate rates and service, would be to permit it to exercise a function beyond its power.

The finding will be for the plaintiff and judgment and decree will be entered accordingly. Counsel for the plaintiff are requested to prepare and submit such finding, judgment and decree to the Court, with a copy thereof to the Attorney General, to counsel for the intervenors and to the amicus curiae. The Court's minutes, entered as of the date below, are as follows:

"The Court, having heretofore heard the evidence and taken this matter under advisement, now finds for plaintiff on its complaint and renders its judgment, order and decree upon said finding, as follows: (Entry to be copied when signed by the Judge.)"

(S.) JOHN W. MACY,

Judge.

May 11, 1946.

61 APPENDIX "C"

ORDER OF THE PUBLIC SERVICE COMMISSION OF INDIANA

November 21, 1945

BEFORE THE
**Public Service Commission
of Indiana.**

IN THE MATTER OF THE INVESTIGATION BY
THE COMMISSION IN RESPECT OF
THE DISTRIBUTION BY PANHANDLE
EASTERN PIPE LINE COMPANY, AS A
PUBLIC UTILITY, OF NATURAL GAS TO
CONSUMERS WITHIN THE STATE OF
INDIANA.

Cause
No. 16741

COMMISSION ORDER

LEROY E. YODER, Chairman
LAWRENCE E. CARLSON, Commissioner
LAWRENCE W. CANNON, Commissioner
SAM BUSBY, Secretary

BEFORE THE
**Public Service Commission
of Indiana**

IN THE MATTER OF THE INVESTIGATION BY
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CONSUMERS WITHIN THE STATE OF
INDIANA.

Cause
No. 16741
Order and
Opinion
Approved
Nov. 21, 1945.

COMMISSION ORDER

APPEARANCES:

For the Commission

FRANK COUGHLIN,
URBAN C. STOVER,
Deputy Attorneys General.

For the Public

GLENN R. SLENKER,
Public Counsellor.
ROBERT E. JONES,
WILLIAM F. DUDINE,
Assistant Public Counsellors.

For Respondent, Panhandle Eastern Pipe Line Company

JOHN S. YOST,
CRUMPACKER, MAY, CARLISLE
& BEAMER,

By George N. Beamer.
BARNES, HICKAM, PANTZER &
BOYD,
By Kurt F. Pantzer,
Allen W. Boyd.

For Intervenor, Central Indiana Gas Company

GEORGE B. PIDOT,
VANATTA, BATTON & HARKER,
By Robert R. Batton.

For Intervenor, Greenfield Gas Company, Inc.

WILLIAM A. McCLELLAN.

For Intervenor, Kokomo Gas & Fuel Company

JOHN E. FELL.

For Intervenor, Northern Indiana Public Service Company

LAWYER & ANDERSON,
By John S. Lawyer,
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For Intervenor, Public Service Company of Indiana, Inc.

EVANS & HEBEL,
By William P. Evans,
Edmond W. Hebel.

For Intervenor, Southern Indiana Gas & Electric Company

ORTMEYER, BAMBERGER
& ORTMEYER,
By Edmund F. Ortmeier.

BY THE COMMISSION

CANNON—Commissioner

On October 13, 1944, the following order in this cause No. 16741 was issued by this Commission, to-wit:

"Public Service Commission of Indiana, having summarily upon its own motion investigated the matter of the operations of Panhandle Eastern Pipe Line Company in distributing natural gas as a public utility within the State of Indiana, has reason to believe that said Panhandle Eastern Pipe Line Company has heretofore, without the approval of this Commission, purported to take over and acquire certain property and franchise rights used and useful in rendering public utility natural gas service to consumers within the State of Indiana, that said Panhandle Eastern Pipe Line Company has heretofore and is now engaged, as a public utility, in the retail sale of natural gas within the State of Indiana, that said Panhandle Eastern Pipe Line Company has not heretofore had and does not now have on file with and approved by this Commission any schedule of rates, rules and regulations covering sales of natural gas by it to consumers in the State of Indiana, that said Panhandle Eastern Pipe Line Company has not filed with this Commission any annual or other reports in respect of its operations within the State of Indiana, and that said Panhandle Eastern Pipe Line Company may in various respects be violating provisions of the Public Service Commission Act and orders of this Commission applicable to it and its operations.

And it appearing to this Commission from its said investigation that sufficient grounds exist to warrant a formal hearing being ordered as to the matters heretofore investigated, this commission hereby furnishes to said Panhandle Eastern Pipe Line Company, pursuant to the requirements of

Section 62 of the Public Service Commission Act, this statement notifying said Panhandle Eastern Pipe Line Company of the matters under investigation, which are as follows, to-wit:

1. The facts and circumstances under which said Panhandle Eastern Pipe Line Company has purported to acquire and hold any property, or franchise or other rights, used or useful in or in connection with sales of natural gas to the Anchor-Hocking Glass Corporation, a consumer of natural gas within the State of Indiana, or to any other consumer or consumers of natural gas within the State of Indiana.

2. The nature, period and extent of natural gas service by said Panhandle Eastern Pipe Line Company to said Anchor-Hocking Glass Corporation, or any other consumer of natural gas within the State of Indiana, and the right, if any, of said Panhandle Eastern Pipe Line Company to render any such service.

3. The matter of the failure of said Panhandle Eastern Pipe Line Company to file with this Commission any tariffs, rules and regulations appertaining to natural gas service to such consumer or consumers as it serves within the State of Indiana.

4. The matter of the failure of said Panhandle Eastern Pipe Line Company to file with this Commission an annual report for the calendar year 1942 and the calendar year 1943, or either of them.

5. The matter of the failure of said Panhandle Eastern Pipe Line Company to file with this Commission an original cost report appertaining to its

property used and useful in rendering natural gas service to consumers within the State of Indiana.

6. Whether or not said Panhandle Eastern Pipe Line Company is a corporation organized under the laws of the State of Indiana.

7. Whether or not said Panhandle Eastern Pipe Line Company now has, and has had at all times while it has been selling natural gas to consumers within the State of Indiana, an office in the State of Indiana, and has kept thereat all books, accounts, papers and records required by this Commission to be kept within the State of Indiana.

8. Whether or not said Panhandle Eastern Pipe Line Company has failed to keep any book, account, paper or record required to be kept by it under the orders of this Commission or has failed to comply with any direction of this Commission relating to any such book, account, paper or record.

9. Whether or not said Panhandle Eastern Pipe Line Company in any other respect is failing or has failed to comply with, abide by and conform with any applicable provisions of the Public Service Commission Act or of the orders and regulations of this Commission.

Dated at Indianapolis, Indiana, this 13th day of October, 1944.

By order of the Public Service Commission of Indiana.

Hugh W. Abbett /s/
Chairman.

SEAL

Attest:

Glen L. Steckley /s/
Secretary."

ABBETT, CANNON AND BARNARD CONCUR:

APPROVED: October 13, 1944

Due notice was given that this cause would be heard in the rooms of the commission, 401 State House, Indianapolis, Indiana, on November 20, 1944, at 2:00 P. M. Said notice was approved October 30, 1944 and is as follows:

"Whereas the Public Service Commission of Indiana, by its order made in the above entitled cause on October 13, 1944, determined that sufficient grounds existed to warrant a formal hearing being ordered as to matters under investigation by the Commission, as set out and contained in said order of October 13, 1944, and whereas a certified copy of said order of October 13, 1944, containing a statement of the matters under investigation was sent to the Panhandle Eastern Pipe Line Company by registered mail on October 14, 1944.

Now therefore, the Commission sets this cause for public hearing upon the matters set out in said order of October 13, 1944, and all matters pertinent thereto, to be held at the Rooms of the Commission, 401 State House, Indianapolis, Indiana, on November 20, 1944, at 2:00 P. M.

It is further ordered that said Panhandle Eastern Pipe Line Company shall appear at such hearing and shall produce testimony and evidence, consisting of its books, records, contracts and documents pertaining to the matters under investigation as set out in said order of October 13, 1944, and that at such hearing opportunity will be afforded said

Panhandle Eastern Pipe Line Company to produce any evidence it may offer pertaining to said matters under investigation.

The Secretary of this Commission is hereby ordered and directed to forward to said Panhandle Eastern Pipe Line Company, by registered mail, a certified copy of this order. Dated at Indianapolis, Indiana, this 30th day of October, 1944.

By order of the Public Service Commission of Indiana."

ABBETT, CANNON AND BARNARD CONCUR:

APPROVED: October 30, 1944

Said notice was duly printed and published in the Winchester News, a newspaper of general circulation printed in the English language and published in the City of Winchester, Randolph County, Indiana, on November 1, 1944; also in The Indianapolis Times, a newspaper of general circulation printed and published in the English language in the City of Indianapolis, Marion County, Indiana, on November 1, 1944; also in the Hoosier Sentinel, a newspaper of general circulation printed and published in the English language in Indianapolis, Marion County, Indiana, on November 3, 1944, and also in the Times Gazette, a newspaper of general circulation printed and published in the English language in the City of Union City, Randolph County, Indiana, on November 9, 1944.

Said notice was duly received by the respondent Panhandle Eastern Pipe Line Company (Panhandle).

In response to the notice dated October 30, 1944, Panhandle alleged that "any action or order of the Public Service Commission of Indiana herein purporting to regulate, interfere with, or otherwise affect the sale and delivery by Panhandle Eastern Pipe Line Company to Anchor-Hocking Glass Company of natural gas transported by Panhandle in interstate commerce would unduly and unlawfully burden interstate commerce in violation of Article 1, Section 8 (3) of the Constitution of the United States, and that if sections 54-112 et seq., Burns Indiana Statutes Annotated, 1933, or any other Indiana statute, is construed to purport to authorize said commission to regulate, interfere with or otherwise affect such sale and delivery, such statutes as so construed are unconstitutional and void because in violation of Article 1, Section 8 (3) of the Constitution of the United States, and denies:

- (a) that it sells natural gas in Indiana except as a part of interstate commerce;
- (b) that it is engaged in intrastate commerce in the State of Indiana;
- (c) that it has transacted or is transacting within the State of Indiana any business as a public utility within said state;
- (d) that the sale and delivery of natural gas transported by it in interstate commerce directly to an industrial consumer is subject to the jurisdiction of the Public Service Commission of Indiana;

- (e) that it is in any manner subject to the jurisdiction of said commission;
- (f) that said commission has any right, power or authority to institute this proceeding against it;
- (g) that the statutory provisions under which this action is instituted (Secs. 54-412, et seq. Burns Indiana Statutes Annotated, 1933) authorizing investigation by said commission of matters relating to any public utility, have any application to it or its business;
- (h) that it is under any obligation to comply with any Indiana statute or any order of said commission relating to public utilities within the State of Indiana; and
- (i) that its business or any part thereof is subject to regulation of any character by said commission."

On or prior to November 20, 1944, Central Indiana Gas Company (Central Gas), Greenfield Gas Company, Inc. (Greenfield Gas), Kokomo Gas & Fuel Company (Kokomo Company), Northern Indiana Public Service Company (Northern Company), Public Service Company of Indiana, Inc. (Service Company) and Southern Indiana Gas & Electric Company (Southern Indiana), each of which was a public utility engaged in supplying natural gas to consumers within the State of Indiana, filed with the Commission respective applications for leave to intervene and be heard in this cause. At the hearing on November 20, 1944, the Commission con-

sidered said applications and granted each of said applicants leave to intervene and be heard herein.

At said hearing, all appearances were entered as above stated except that Mr. Frank Coughlin, Mr. Urban C. Stover, Mr. Glenn R. Slenker, Mr. Robert E. Jones, Mr. George B. Pidot, Mr. Kurt Pantzer, Mr. R. Stanley Anderson and Mr. William P. Evans entered their respective appearances for their respective clients at later hearings of this cause.

At the hearing on November 20, 1944, it was, with the approval of the Commission, agreed between the Public Counsellor, counsel for Panhandle and the respective counsel for the intervenors that the parties to the proceedings would endeavor to agree upon, and would file in this cause, a Stipulation of Facts; that any stipulated facts would be subject to objection as to relevancy and materiality by any party thereto if such objection was made within such time as the Commission should fix; and that the stipulated facts could be supplemented and other facts could be shown by oral testimony taken and exhibits offered at a hearing.

The hearing was then continued to December 4, 1944, to permit time for the working out of the proposed Stipulation of Facts. By subsequent orders of the Commission the date of further hearing was further continued from time to time to January 9, 1945, at which date a Stipulation of Facts (Stipulated Facts), dated January 9, 1945, signed by the Public Counsellor, counsel for Panhandle and counsel for all the respective

intervenors was introduced and received in evidence. At such hearing, counsel for Panhandle filed objections to the relevancy and materiality of certain parts of the evidence contained in the Stipulated Facts; and the Public Counsellor and counsel for the intervenors all advised the Commission that they raised no objections to the reception and consideration by the Commission of any of the Stipulated Facts. At said hearing the parties in this cause also advised the Commission that they had been unable to agree upon a stipulation in respect of certain matters, and requested the Commission to fix a time for the taking of oral evidence and the production of exhibits in respect of such matters or of matters supplementary to the Stipulated Facts which any of the parties might desire to offer. The Commission fixed February 6, 1945, as the date for such further hearing. Subsequently by orders of the Commission the date for such hearing was, for cause shown, continued from time to time until March 28, 1945, at which time a Stipulation of Evidence, including exhibits thereto, were offered by all the parties hereto, and oral testimony and exhibits were offered by the Public Counsellor and by certain of the intervenors. Most of such proffered evidence was received by the Commission, subject to its later ruling upon objections by counsel for Panhandle to the relevancy and materiality of certain parts thereof.

The evidence offered in this cause consists of the following:

- A. The Stipulated Facts, including the exhibits attached thereto as a part thereof.
- B. A Stipulation of Evidence, dated March 28, 1945, including the exhibits attached thereto as a part thereof.
- C. Oral testimony presented at the hearing on March 28, 1945, by William F. Lebo, then the Acting Chief Engineer of the Commission and now its Chief Engineer, who was called as a witness by the Public Counsellor, and by L. B. Schiesz, First Vice-president of Service Company, by Guy T. Henry, President of Central Gas, and by Edward M. Hahn, President and General Manager of Kokomo Company, who were called as witnesses by the respective respondents with which they are connected.
- D. The record of the testimony of Oscar W. Morton, Rate Engineer of Panhandle, before the Federal Power Commission on February 26, 1945.
- E. Supplemental Stipulation of Facts, dated October 3, 1945, including the exhibits attached thereto as a part thereof.
- F. The following exhibits (in addition to the exhibits attached to and identified in the Stipulated Facts, the Stipulation of Evidence and the Supplemental Stipulation of Facts):

Commission:

No. 1—Proof of publication of notice of hearing in the Gazette, Winchester, Indiana.

No. 2—Proof of publication of notice of hearing in The Indianapolis Times, Indianapolis, Indiana.

No. 3—Proof of publication of notice of hearing in the Hoosier Sentinel, Indianapolis, Indiana.

No. 4—Proof of publication of notice of hearing in the Times Gazette, Union City, Indiana.

No. 5—Notice of investigation in this cause, issued by the Commission on October 13, 1944.

No. 6—Order issued by the Commission in this matter on October 30, 1944, setting this matter for hearing.

Public Counsellor:

No. 1—Analysis of sales of gas to ultimate consumers in Indiana and statement of gas property and plant investment, etc.

No. 2—Copy of resolution as adopted by Board of Directors of Panhandle on March 19, 1945.

Service Company:

No. 1—Map showing gas facilities of Service Company.

No. 2—Statement showing gas utility statistics of Service Company.

No. 3—Statement showing gas utility net operating income and pro forma operating income of Service Company.

Central Indiana:

No. 1—Statement showing gas utility net operating income and pro forma operating income of Central Indiana.

Kokomo Company:

No. 1—Statement showing gas utility statistics of Kokomo Company.

No. 2—Statement showing gas utility net operating income and pro forma operating income of Kokomo Company.

It was agreed between the Commission and the parties to this cause, that the objections to the relevancy or materiality of the evidence, which were made by any party hereto and were not acted on by the Commission at the time made, should be argued in briefs to be filed, and in oral argument; and should thereafter be ruled upon by the Commission.

Following the hearing on March 28, 1945, briefs and reply briefs were filed by the Public Counsellor, intervenors, and Panhandle. On October 3, 1945, this Commission heard oral arguments in this cause, at which time additional briefs were presented by Central Gas and by Panhandle.

The Commission is fully appreciative of the public importance of the issue here under investigation. Because of this fact, it has been anxious throughout these proceedings to afford the interested parties ample opportunity to present fully to the Commission their re-

spective views upon the matters involved. It has sought, too, such full factual information as would shed light upon any phase of the regulatory problem which the Commission has before it in this investigation. The fundamental issues involved are not narrow ones and the Commission feels that it has a better background for dealing with the public issues here at stake if it has before it the full history of the development of the natural gas utility business in Indiana, of the place of Panhandle and its predecessors in that development, of the activities that Panhandle is carrying on or may be endeavoring to carry on, and of the possible effect of such activities upon the effectiveness of regulation of direct consumer sales in Indiana and upon the interest of the gas consuming public in Indiana. The Commission believes that all of the evidence adduced in this cause directly sheds light upon such matters.

Prior to this investigation, the Commission had never been supplied with information as to the activities of Panhandle within the state. When the supplying of direct consumer gas service was commenced by Panhandle in Indiana it did not file, and has at no time since filed, with the Commission any reports, tariffs or regulations. The evidence in this investigation supplies in part such information as the Commission would normally have from required reports. In an investigation of this kind—an investigation by a regulatory agency on its own motion and for purposes of determining its regulatory duties—no narrow conception of the restriction of factual information should be adopted. The

Commission concludes, therefore, that all the evidence presented in this cause should be received by it as a part of the record in this cause, and that each and all of the objections of Panhandle to the relevancy or materiality of any evidence offered should be overruled: and it will be so ordered.

FINDINGS OF FACTS

The Commission, having heard and considered the evidence presented in this cause and being duly advised in the premises finds that the evidence in this cause establishes facts which are summarized and found as follows:

1. Panhandle, a Delaware corporation, at and prior to sometime in the year 1931, had constructed its main transmission line extending from the Amarillo Gas Field in the Texas Panhandle and the Hugoton Gas Field in southwestern Kansas through the States of Oklahoma, Kansas, Missouri and Illinois, to a point near the Indiana-Illinois state line. In 1932 the eastern end of this line was interconnected near Dana, Indiana, with gas transmission lines built by Indiana Gas Transmission Corporation (Indiana Transmission), a Delaware corporation, extending to Zionsville, Indiana, and to Muncie, Indiana. Near Muncie, said line interconnected with gas transmission lines from Ohio owned and operated by Ohio Fuel Gas Company (Ohio Fuel), an Ohio corporation. Early in 1936, Indiana Transmission was merged into Michigan Gas Transmission Corporation (Michigan Gas), a Delaware corporation, and the line to Zionsville was extended

eastward across Indiana, the northwest corner of Ohio, and Michigan to a point near Detroit, Michigan. Indiana Transmission, Michigan Gas and Ohio Fuel were all subsidiaries of Columbia Gas & Electric Corporation (Columbia Gas), a Delaware corporation, or its affiliates. The relationship of Columbia Gas and its affiliates and Panhandle are set forth in Findings made and an Opinion given by the Securities and Exchange Commission on May 27, 1941, in Files numbered 31-106, 31-107, 31-108, 31-109, 31-422, 31-423 and 31-493 pending before it, which Findings and Opinion are a part of the record in this cause as "Exhibit D" in the Stipulated Facts. On February 6, 1942 Panhandle acquired from Columbia Gas or subsidiaries all the stock of Michigan Gas and the gas facilities in Indiana of Ohio Fuel. On March 31, 1943, Panhandle liquidated Michigan Gas and acquired directly all its properties. Said line and appurtenant facilities as presently constituted, consist of 22-inch, 24-inch and 26-inch transmission mains, branch lines, dehydration plants, gasoline plant, compressor stations and related facilities incidental to the transmission and delivery of such natural gas. As a result of the completion of Panhandle's 1943 construction program, an additional continuous parallel main runs from a point near Liberal, Kansas, to a point 68.8 miles northeast of Zionsville, Indiana, and from a point near Edgerton, Indiana, to a point in Ohio 18.2 miles northeast of Edgerton. The details of the development of this gas transmission system, and the operation thereof, is shown by Stipulated Facts and particularly in Section VI, Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 thereof and the supporting exhibits therein referred to and

made a part thereof as "Exhibits A to H-3," both inclusive. The gas fields and the transmission system are shown more fully on the map, which is a part of the Stipulated Facts as "Exhibit C."

2: Said gas transmission line and other facilities were constructed, or acquired, for the purpose of transporting natural gas from the said gas fields in Texas and Kansas to the intervening States, including the State of Indiana, and the Detroit area and selling such gas directly or indirectly to the public; and Panhandle is now engaged, and it, or the related Columbia Gas Subsidiaries, have continuously since such construction and acquisition, been engaged in the business of furnishing such natural gas in the State of Indiana and elsewhere, directly or indirectly, to all types of consumers, residential, commercial and industrial. At the present time, Panhandle holds a Certificate of Admission, issued to it on September 19, 1935, by the Secretary of State for Indiana, authorizing it to transact business in the State of Indiana as a foreign corporation, which recites that the character of business, under its Articles of Incorporation, which it is authorized to transact in Indiana, is as follows:

"To engage in the business of transmitting and transporting natural gas, artificial gas, mixtures of natural and artificial gases, oil and any by-product thereof, in, into, through and from the State of Indiana and any other state except the State of Delaware, and of supplying gas and other of said articles so transmitted and transported by it to other corporations, public or private or persons, firms, associations or other organizations, en-

gaged in the business of supplying gas or other of said articles to the public.

"To lay, construct, purchase, lease or otherwise acquire, hold, own, improve, maintain and operate, pipe lines and mains for the transmission and transportation of gas and said other articles as aforesaid, and to sell, lease or otherwise dispose of the same.

"To produce or purchase or otherwise acquire, store and transmit such gas, and said other articles, and to sell or otherwise dispose of the same to corporations, persons, firms, associations or other organizations as aforesaid.

"To purchase, lease, take, in exchange, or acquire in any other manner now or hereafter authorized by law, hold, possess, improve, construct, develop, deal in and sell, convey, assign or otherwise dispose of any and all property of every kind and description, real, personal or mixed, necessary, convenient or suitable for the purposes of the Corporation, including, without limiting the foregoing, any and all rights of way, easements, interests, franchises, licenses and privileges in the same; provided, however, that the Corporation shall not acquire, own, hold or lease real estate in the State of Indiana except such as may be necessary for the proper carrying on of its legitimate business."

At the end of the above there appears the following declaration, which the Commission judicially knows was copied from the application for admission made by Panhandle:

"The business above described being for the purpose of interstate commerce only and not that of a public utility business in Indiana." (See "Exhibit B" attached to the Stipulated Facts.)

3. Panhandle sells and delivers in Indiana the natural gas transported by it (1) to other gas companies, including all of the intervenors except Southern Indiana, which purchasers distribute such gas to residential, commercial and industrial consumers served by them, and (2) to one industrial consumer, Anchor-Hocking Glass Corporation (Anchor-Hocking), served directly by Panhandle.

4. Prior to January 9, 1945 Panhandle filed with the Federal Power Commission its application under the Natural Gas Act for a certificate of convenience and necessity to construct in Indiana, as a part of its "general pipe line system", a 3-inch lateral line extending from one of its main lines to a point near the Town of Fortville, Indiana, and certain facilities, which line and facilities were to be used to transport in inter-state commerce, and to deliver, gas to be sold to two Indiana utilities for resale, and also, if a proposed contract with the E. I. DuPont de Nemours (DuPont) was consummated, to be sold directly to DuPont for consumption at its plant adjacent to said town. Subsequently to the filing of said application, but prior to January 9, 1945, said contract between DuPont and Panhandle was entered into. On June 5, 1945, after hearings, the Federal Power Commission entered its order on said application in which it granted a certificate to Panhandle to construct the proposed line, but specifically prohibited Panhandle from using the

line for "either the transportation or sale of natural gas, subject to the jurisdiction of" the Federal Power Commission, "to any new customers except upon specific authorization" by said commission. Under date of June 29, 1945 Panhandle filed with the Federal Power Commission an application for a modification, without hearing, of the aforesaid provisions of said order so as to permit the use of said line for the transportation of gas to be sold to DuPont, and the construction of certain additional facilities for such delivery and in said application represented that it had received authority from the war production board to supply gas to DuPont and that delay in such gas supply would hold up peak production of war supplies. On July 7, 1945 the Public Counsellor, and on July 9, 1945 this Commission, protested against the modification of the Order of June 5, 1945 prior to a showing that state laws had been complied with. The Federal Power Commission, on July 10, 1945 and without a hearing, modified its Order of June 5, 1945, so as "to permit such service and operation as" were thereafter in such order of modification "ordered" and conditioned". Said order then provided:

"(A) The certificate of public convenience and necessity issued by the Commission's order of June 5, 1945, in these matters be and it is hereby modified to authorize Panhandle Eastern's transportation and service of natural gas to Du Pont, subject to the jurisdiction of the Commission as described in the record of this proceeding.

"(B) This order is without prejudice to the authority of the Indiana Commission in the

exercise of any jurisdiction which it may have over the sale or service proposed to be rendered by Panhandle Eastern to Du Pont.

“(C) Panhandle Eastern shall report to the Commission promptly in writing, under oath, the date of the commencement of the deliveries of natural gas to Du Pont.

“(D) Except as herein modified, the provisions of the Commission’s order of June 5, 1945, in these matters, including all conditions, shall remain in full force and effect.”

On August 30, 1945, the Federal Power Commission issued to Panhandle in Docket No. G-607 a certificate of convenience and necessity authorizing it “to construct and operate facilities for the transportation and sale for resale of natural gas in interstate commerce, to the extent and subject to the terms and conditions specified in said order and certificate.” Panhandle asserts, as of October 3, 1945, that the facilities were constructed but that DuPont was not yet ready to take gas. So far as the Commission is advised Panhandle has not since said date supplied any gas to DuPont in Indiana. (See Section VI, Paragraph 12 of the Stipulated Facts and “Exhibit J-1” and “Exhibit J-2” filed therewith, and the Supplemental Stipulation of Facts and all exhibits filed therewith). Panhandle has not yet applied to this Commission for any Necessity Certificate authorizing it to render gas service direct to consumers within the rural area in which the plant of DuPont is located. Panhandle plans to sell all industrial customers within reach

of its facilities in Indiana who meet Panhandle's requirements.

5. Panhandle does not directly sell in Indiana any gas to residential and commercial consumers, except that it does supply for a moderate charge gas for residential use to seven of its employees, who live in company owned houses located on Panhandle's property. As part of its obligation under certain right of way agreements in other States and similar arrangements with its own employees, Panhandle, throughout its entire system, is now rendering service to approximately 194 residential customers and the revenue therefrom for the year ended December 31, 1943, amounted to \$12,220.49. During the same year, revenue from direct industrial sales for the entire system amounted to \$1,559,195.24 and revenue from sales to other gas companies for resale amounted to \$22,072,005.40. Current sales are being made in approximately the same proportions.

6. Approximately 950,000 consumers are supplied directly or indirectly with gas from the Panhandle system, including more than 112,000 consumers in Indiana. The number of industrial consumers served directly by Panhandle in the entire system was 21 in 1943, and is 23 at the present time. The names of such consumers, the location of their plants at which natural gas is supplied by Panhandle and the years in which direct service of natural gas by Panhandle to such plants commenced are given in a table, which is shown on page 12 and forms a part of Section VI, Paragraph 13 of the Stipulated Facts.

7. For the 12 months period ending September 30, 1944, the amounts in thousands of cubic feet (M. C. F.) of gas purchased by the intervenors from Panhandle and resold by them to industrial consumers and the revenue derived by the intervenors therefrom were as follows:

Company	M. C. F. Sales	Revenue
Central Gas	9,004,962	\$2,624,557.81
Kokomo Company ...	480,406	196,241.70
Northern Company...	940,340	545,940.00
Service Company	1,978,605	812,631.80

8. Anchor-Hocking is engaged in its plant at Winchester, Indiana, in the manufacture of glassware and the natural gas purchased from Panhandle for use at the Winchester plant of Anchor-Hocking is used in the manufacture of products produced there. (See Section VI, Paragraph 14 of the Stipulated Facts.)

9. Central Gas serves natural gas purchased by it from Panhandle to more than 30 large industrial consumers which is delivered to them by Central Gas and used by them in their manufacturing plants in Indiana. Said industrial consumers include Hart Glass Division of Armstrong Cork Company, Ball Brothers Company, Foster-Forbes Glass Company, Owens-Illinois Glass Company, Slick Glass Corporation, Sneath Glass Company, The Warfield Company, Sterling Glass Division, Delco-Remy Division of General Motors Corporation, Indiana Steel and Wire Company, Johns-Manville Products Corporation, The National Tile Company and Warner Gear Company. (See Section VI, Paragraph 15 of the Stipulated Facts.)

10. Service Company serves natural gas purchased by it from Panhandle to 9 large industrial consumers in Indiana, which is used by them in their manufacturing plants in Indiana. Said industrial consumers include Aluminum Company of America, Chrysler Corporation, Ingersoll Steel and Disc Division of Borg-Warner Corporation and Ingram Richardson Company. (See Section VI, Paragraph 16 of the Stipulated Facts.)

11. Kokomo Company serves natural gas purchased by it from Panhandle to 6 large industrial consumers in Indiana, which is used by them in their manufacturing plants there. Said industrial consumers are Continental Steel Corporation, American Radiator and Standard Sanitary Corporation, Haynes-Stellite Company, Kingston Products Corporation, Chrysler Corporation and Globe Stove and Range Company. (See Section VI, Paragraph 17 of the Stipulated Facts.)

12. Northern Company serves natural gas purchased by it from Panhandle to 72 large industrial consumers in Indiana, which is used by them in their manufacturing plants there. Said industrial consumers include General Electric Company, International Harvester Company, Studebaker Corporation and Phelps-Dodge Corporation. (See Section VI, Paragraph 18 of the Stipulated Facts.)

13. Panhandle, in Indiana, sells natural gas to Kentucky Natural Gas Corporation, which company resells all or the principal part of such natural gas to companies distributing, as public utilities, natural gas to residential, commercial and industrial consumers in Indiana. Panhandle, in Indiana, also

sells natural gas to the following companies or municipal corporations, which are public utilities or municipalities distributing such gas and the number and classification of gas consumers served by such gas from Panhandle are approximately, as follows:

Name of Company	Approximate Number of Customers Served:				Total
	Resi- dential	Commercial	Industrial	Other	
Central Gas	31,384	1,322	103	none	32,809
Greenfield Gas	1,296	59	2	4	1,361
Indiana Gas Distribution Corp. (Indiana Gas)					2,070
Indiana-Ohio Public Service Co. (Ind.-Ohio Co.)	3,314	219	11		3,544
Kokomo Company	6,674	379	23		7,076
Lynn Natural Gas Company	265	28			293
Northern Company (Ft. Wayne District)	31,633	1,160	67	68	32,928
Pendleton Natural Gas Company	617	39			656
Service Company	22,516	1,916	46	120	24,598
Richmond Service Company					6,800
Town of Lapel					250
Town of Montezuma					100
Town of Pittsboro					116
Town of Roachdale					92
Total	97,699	5,122	252	192	112,699

27

89

(See Section VI, Paragraph 19 of Stipulated Facts.)

14. Deliveries of natural gas by Panhandle directly to industrial customers using large quantities of gas, and to other gas companies for resale to industrial customers using large quantities of gas, are, in most instances, subject to curtailment, interruption or discontinuance in the event of an insufficiency in the supply of gas.

15. The details of the service of natural gas to Anchor-Hocking since 1931, when it first commenced the extensive use of natural gas as a fuel at its plant at Winchester, Indiana, will be found in Section VI, Paragraph 21 of the Stipulated Facts and the supporting Exhibits mentioned therein, being "Exhibit G-6," "Exhibit K," "Exhibit L," and "Exhibit M," "Exhibit N-1," "Exhibit N-2" and "Exhibit N-3." Briefly summarized, from 1931 until May 11, 1942, Anchor-Hocking received this service from Indiana Gas, a public utility under the Indiana Act, which, in turn, purchased the gas from Panhandle or its predecessor, Michigan Gas, and this service was taken over by Panhandle under its contract dated May 11, 1942, copy of which is attached to the Stipulated Facts as "Exhibit N-2."

16. In the service of such natural gas directly to Anchor-Hocking, Panhandle transports the gas through a 6-inch lateral or branch gas transmission line ("Winchester line") extending north from Panhandle's main line a distance of about 7 miles, which Winchester line was constructed early in 1931. The pressure in the said main line, which is a 16-inch line running from a point near Muncie to a point in Ohio near the Indiana-Ohio State Line,

is normally carried at approximately 200 pounds per square inch. At or adjacent to a point where the natural gas is taken into the Winchester line from said 16-inch line, the pressure is reduced by means of a regulator, owned and operated by Panhandle, to approximately 100 pounds per square inch and the gas in the Winchester line is sold by Panhandle (1) to Anchor-Hocking for its own use and (2) to Indiana-Ohio Company for resale to consumers in Winchester, Portland and Union City in Indiana, and Union City in Ohio, and their environs. Adjacent to the northeast corner of the corporate limits of Winchester, Indiana, Panhandle has two meter houses located approximately 400 feet apart, both of which are located on plant property of Anchor-Hocking. In one of these are the regulators and meters used in connection with deliveries to Anchor-Hocking and in the other, regulators and meters used in connection with deliveries to the Indiana-Ohio Company. A branch of the Winchester line runs directly into each of these meter houses and gas enters both at the same pressure, which is normally about 80 pounds per square inch. At the Anchor-Hocking meter house, the gas passes first through a regulator which reduces the pressure to approximately 40 pounds per square inch, then through two orifice meters into a header. From this header a four-inch service line carries the gas to the plant at the metering pressure (40 pounds per square inch). From this header gas also passes into another regulator in the meter house which reduces the gas to a pressure of approximately 10 pounds per square inch. From this regulator the gas at such pressure passes through a ten inch line directly

into the glass plant. Anchor-Hocking takes delivery of all gas at the outlet side of Panhandle's meter house. In 1943, Panhandle sold 1,150,279 M. C. F. of natural gas to Anchor-Hocking and 151,065 M. C. F. of natural gas to Indiana-Ohio Company. The Winchester line is located in part on certain public county highways in Randolph County pursuant to authority granted by the Board of Commissioners of said County to Ohio Fuel Gas Company, which built the line originally before it was acquired by Panhandle on February 6, 1942. (See Section VI, Paragraphs 22, 23, 24, 25, 26 and 27 of the Stipulated Facts.)

17. Except as above shown, no franchise authorizing the sale or delivery of natural gas under the contract between Panhandle and Anchor-Hocking dated May 11, 1942, which is attached to the Stipulated Facts as "Exhibit N-1," has been acquired by Panhandle from the State of Indiana or any agency thereof, or is claimed by Panhandle to have been so acquired. (See Section VI, Paragraph 28 of the Stipulated Facts.) Panhandle has not filed with the Public Service Commission of Indiana any tariffs of rates or any rules or regulations relating to the sale of natural gas to Anchor-Hocking; and Panhandle has at no time filed with the Public Service Commission of Indiana any annual report or any other periodic report, nor has it filed any original cost report appertaining to any portion of its property in Indiana. Panhandle has not purported to keep its books, accounts, papers or records in the manner required under the orders and directions of the Public Service Commission of Indiana for public utilities subject to the jurisdiction thereof.

In keeping its books, accounts, papers and records Panhandle is subject to the rules and regulations of the Federal Power Commission, but Panhandle claims that direct sales by it to industrial consumers are not subject to regulation by the Federal Power Commission. (See Section VI, Paragraphs 30, 31, 32, 33 and 34 of the Stipulated Facts.)

18. Each of the intervenors in this Cause has filed with the Public Service Commission of Indiana, sworn annual reports for the years 1942 and 1943, as provided for by the Public Service Commission Act of the State of Indiana.

19. After an exchange of letters between Panhandle and Kokomo Company in June 1943, the preliminary arrangements for such a meeting, being made on June 30, 1943, certain representatives of Panhandle and of Kokomo Company had a meeting with Mr. Williams and Mr. Clifford of Continental Steel Corporation, one of the large industrial consumers being served by Kokomo Company with gas being purchased by it from Panhandle. In the course of this conference, Mr. Morton, one of the representatives of Panhandle, reiterated what he had already stated on the day previous to Mr. Hahn of Kokomo Company, namely, that it would be the purpose and intention of Panhandle in the future to make all contracts for supplying gas to large industrial consumers direct with such consumers and that Panhandle hoped to make such arrangements with Continental Steel Corporation. (See Section 14 of the Stipulation of Evidence.)

20. On the afternoon of June 30, 1943, Messrs. Morton and Ballard, representing Panhandle also,

called on certain representatives of Service Company in connection with the matter of a supply of natural gas for the Ingersoll Steel and Disc Division of the Borg Warner Corporation (Ingersoll Company), a large industrial consumer at New Castle, Indiana, then being supplied by Service Company under an interruptible gas contract with gas obtained from Panhandle. Mr. Morton stated that the Federal Power Commission had previously ruled that direct sales of gas to consumers of pipe line companies were not subject to regulations by such Commission; that Panhandle desired to sell as much industrial load direct to industries as possible in order to remove this segment of its business from the jurisdiction of such Commission; that Panhandle proposed to sell direct to the industrial consumers at the points of inter-connection between the facilities of Panhandle and the existing distributing utilities whose facilities would be utilized to transmit the natural gas for the account of the industrial consumers; that present plans of Panhandle contemplated limiting the size of interruptible industrial consumers that Panhandle desired to serve direct to such consumers as had a monthly consumption of about 10,000,000 or more cubic feet of gas. On the following day, Messrs. Morton and Ballard of Panhandle again stated to representatives of the Ingersoll Company that Panhandle intended to serve natural gas direct to their plant, and likewise intended to serve direct all other large industrial consumers up and down the pipe line of Panhandle; and under date of July 19, 1943, Panhandle forwarded to Service Company for acceptance, an extension of the Ingersoll Supply Con-

tract which provided for termination by either party on 60 days written notice, and on July 29, 1943, Service Company accepted such extension agreement and on the following day entered into a supplemental agreement with the Ingersoll Company fixing a like termination period. This latter agreement was filed with and approved by the Public Service Commission of Indiana. (See Sections 15, 16 and 17 of the Stipulation of Evidence.)

21. (a) Early in 1941, Panhandle and Central Gas carried on certain negotiations with reference to the terms and provisions of a new gas supply contract and on or about July 31, 1941, both companies executed and delivered a new supply contract (See "Exhibit L" of the Stipulation of Evidence). Panhandle subsequently informed Central Gas that its Board of Directors refused to approve said contract although the signature clause indicated that the officers of Panhandle, who had signed the same in its behalf, acted with authority. This refusal of approval was based upon the fact that the contract, in effect, would prohibit Panhandle from undertaking direct service to industrial customers in the area being served by Central Gas. Numerous conferences were held between representatives of Panhandle and Central Gas with reference to this matter during the remainder of 1941 and prior to August 4, 1942, on which latter day Central Gas directed to the Federal Power Commission for filing under the Natural Gas Act, a Petition, which is included in the Stipulation of Evidence as "Exhibit K."

(b) Thereafter, while said Petition, "Exhibit

34

K," was pending, Panhandle filed with the Federal Power Commission its notice of cancellation or termination dated May 18, 1943, which is attached to the Stipulation of Evidence and included therein as "Exhibit L," and which was in the words and figures following, to-wit:

**"NOTICE OF CANCELLATION OR
TERMINATION**

Federal Power Commission

Washington, D. C.

Gentlemen:

"Notice is hereby given that the following identified rate schedules filed with the Federal Power Commission by Michigan Gas Transmission Corporation (now Panhandle Eastern Pipe Line Company) are proposed to be cancelled on the dates respectively set forth opposite the description of each of said schedules:

PEPL Co. Rate Schedule RPC Number	Name of Ultimate Industrial Customer	Date of Contract	Date of Proposed Term'n
76	Guide Lamp Division of Gen. Motors Corp.	9/12/40	7/19/43
72	Sterling Glass Co.	7/ 8/40	8/ 3/43
Supp. 15 to 71	Slick Glass Co.	2/16/40	7/19/43
74	Owens-Illinois Glass Co.	5/27/41	7/19/43
Supp. 17 to 71	Foster-Forbes Glass Co.	10/31/40	8/ 3/43
Supp. 6 to 71	Aladdin Industries	10/ 5/38	7/19/43
Supp. 7 to 71	Sneath Glass Co.	10/ 5/38	7/19/43
Supp. 14 to 71	Hart Glass Div. of Armstrong Cork Co.	11/13/39	7/19/43
Supp. 5 to 71	Indiana Glass Co.	9/27/38	7/19/43
Supp. 13 to 71	Ball Brothers	11/ 1/39	7/19/43
Supp. 16 to 71	Banner Rock Div. of Johns-Manville Corp.	8/20/40	7/19/43
Supp. 11 to 71	General Insulating Co.	10/20/38	7/19/43
29	Banner Rock Div. of Johns-Manville Corp.	5/ 5/41	7/19/43
28	Eaton Canning Co.	5/ 5/41	7/19/43

32

32

"The aforementioned Michigan Gas Transmission Corporation rate schedules numbers 28 and 29 are so designated for the reason that Panhandle Eastern Pipe Line Company has not been advised that new Panhandle Eastern Pipe Line Company schedule numbers have been assigned thereto.

"The above notice was served on Central Indiana Gas Company by depositing a copy thereof in the United States mail, addressed to Central Indiana Gas Company at Muncie, Indiana, on the eighteenth day of May, 1943.

"No negotiations are presently in progress for a continuance of the service to the customers covered by the said rate schedules, however, it is the intention of Panhandle Eastern Pipe Line Company to negotiate with said several industrial customers for a continuation of the service directly by Panhandle Eastern Pipe Line Company. Also, it is the intention of Panhandle Eastern Pipe Line Company to negotiate with Central Indiana Gas Company for the purpose of effecting necessary arrangements for the delivery of gas by Central Indiana Gas Company to each of said customers for the account of Panhandle Eastern Pipe Line Company.

"Panhandle Eastern Pipe Line Company is not advised whether Central Indiana Gas Company

approves or disapproves of the cancellation and termination of said several rate schedules.

Yours very truly,

PANHANDLE EASTERN PIPE
LINE COMPANY

By C. Buddrus
President

7 Dated this 18th day of May, 1943,
at Kansas City, Missouri."

(c) Thereafter, on June 3, 1943, representatives of Central Gas conferred with the Chairman of the Board and President, respectively, of Panhandle with respect to Panhandle's official declaration of intention to render direct gas utility service, contained in the above Notice of Cancellation, and at that conference, the representatives of Panhandle stated that Panhandle was interested in serving directly certain industrial customers of Central Gas but on some basis which would make such direct sales by Panhandle outside of the jurisdiction of the Federal Power Commission under the Natural Gas Act; that Panhandle was anxious to take over such business because it was an unregulated transaction both as to the Federal Power Commission and the Public Service Commission of Indiana, and that it intended to establish higher industrial rates based on a competitive fuel basis. On or about June 11, 1943, at another conference between representatives of Panhandle and Central Gas, the representatives of Panhandle again stated, in sub-

stance, that Panhandle intended to take over direct service to certain of the large industrial customers of Central Gas and any negotiations would have to be with that eventuality in mind.

(d) On August 9, 1943, Central Gas addressed a letter to Federal Power Commission with reference to the Notice of Cancellation dated May 18, 1943, filed by Panhandle with that body which said letter contained, in part, the following:

"It is the declared policy and intention of Panhandle Eastern Pipeline Company to abandon service to Central Indiana Gas Company for resale to these industrial consumers, and to try to take over and serve directly these industrial consumers so that the rates to be charged therefor will be beyond the regulatory control of the Federal Power Commission. Since it is patently impossible, as shown by the attached map, for Panhandle Eastern Pipeline Company now to serve these industrial consumers except by means of the facilities of Central Indiana Gas Company and since, as stated by Panhandle Eastern Pipeline Company in its notice of cancellation, it intends to continue service for these industrial consumers, we do not see that there is any alternative for Central Indiana Gas Company but to disapprove and oppose vigorously the proposed cancellation. It is clear that the present and future public convenience and necessity will not permit such proposed abandonment. Further, it is noteworthy that the underlying purpose of such proposed abandonment is to try to effect a technical or paper rearrangement of this sale to

Central Indiana Gas Company for resale to industrial consumers, so that it will have the appearance of a direct sale and hence be at rates not subject to the jurisdiction of the Federal Power Commission."

(e) Under date of September 1, 1943, Panhandle addressed a letter to the Federal Power Commission and sent a copy thereof to Central Gas, which was in the following words and figures, to-wit:

"September 1, 1943

Federal Power Commission

Washington, D. C.

Attention: Leon M. Fuquay, Secretary

Re: Docket No. G-495

Dear Sirs:

"This letter is with reference to the letter of Central Indiana Gas Company to you, dated August 9, 1943, protesting our notice of cancellation, dated May 18, 1943, of contracts with Central Indiana Gas Company for its gas requirements for resale to fourteen of its industrial customers.

"We have not concluded negotiations with certain other war industries, not presently served by us, which would require volumes of gas equal to those volumes required by Central Indiana Gas Company to serve said fourteen industrial customers. Moreover, because of the shortage and the conservation of critical materials, we are unable at this time to obtain the necessary facili-

ties to render direct service to any of the industries named in our notice of cancellation.

"Without altering our policy to any extent whatsoever with respect to this matter, but for the reasons above stated, we hereby withdraw said notice of cancellation, dated May 18, 1943, as amended and extended by our letters to Federal Power Commission, dated June 14, 1943, and July 23, 1943, without prejudice to our right of again filing a similar notice of cancellation, which we intend to do, at such time as it may appear to us to be desirable.

Very truly yours,

President

cc: Central Indiana Gas Company?"

(f) On October 22, 1943, Central Gas addressed a letter to the Federal Power Commission with reference to the same matter, which was in the words and figures following:

"October 22, 1943

Federal Power Commission

Washington, D. C.

Attention: Office of the Secretary

Dear Sirs:

"We have received, presumably from Panhandle Eastern Pipeline Company, an unsigned copy of letter dated September 1, 1943, addressed to the Federal Power Commission and referring to *Docket No. G-495*.

"That letter withdraws the notice of cancella-

tion by Panhandle Eastern Pipeline Company to the Federal Power Commission, dated May 18, 1943, as amended and extended, relating to certain rate schedules therein described for natural gas service to Central Indiana Gas Company for resale to industrial consumers. Since our letter to you dated August 9, 1943, disapproving and opposing the proposed cancellation was in the nature of a protest responsive to the notice of cancellation, we should like to advise that in view of the withdrawal of that notice of cancellation, the Commission may consider that the purpose of our protest has been effectuated. Accordingly, we are pleased to have the Commission consider our protest as withdrawn. Since there appears a statement in the letter of withdrawal by Panhandle Eastern Pipeline Company that they intend at some future time to file again a similar notice of cancellation, our withdrawal is necessarily without prejudice to our rights of filing again a protest or taking any other action which may be necessary or desirable to assure compliance by Panhandle Eastern Pipeline Company with the requirements of the Natural Gas Act.

Very truly yours,

CENTRAL INDIANA GAS
COMPANY

By Guy T. Henry
President."

(See Sections 18, 19, 20, 21, 22, 23, 24, 25 and 26 of the Stipulation of Evidence and the supporting Exhibits referred to therein, respectively.)

22. A compilation taken from the annual reports of the gas public utilities operating in Indiana under the jurisdiction of the Public Service Commission for the year 1943 shows that the book cost of gas plant (undepreciated), exclusive of common property used in other branches of the utilities business, is in excess of \$85,000,000; that the total gas consumption in thousands of cubic feet was 48,356,978.5 and that the total gross revenues derived from such sales of gas amounted to \$26,301,204.14. It also showed that of the total consumption above mentioned in thousands of cubic feet, industrial sales amounted to 30,323,524.8, or 62.71% of the total; and that of the gross revenues above mentioned, sales to industry produced \$10,078,079.84, or 38.32% of the total. It also showed that the total number of consumers was 451,934 of whom 432,748, or 95.75%, were domestic consumers, 17,010, or 3.76%, were commercial and 1,242, or .028%, were industrial consumers (See Public Counsellor's Exhibit No. 1).

23. Oscar W. Morton, a Rate Engineer of Panhandle, testified before the Federal Power Commission on February 26, 1945, substantially as follows: Panhandle would not willingly sell and deliver gas at Fortville, Indiana, for resale to the Dupont plant because they want to make as much money as they can out of that business and they can make more money selling gas directly than by selling it to someone, who, in turn, resells it and thus brings the transaction under the jurisdiction of the Federal Power Commission. If any other industrial plants than Dupont show an interest in obtaining gas, they would want to serve them

directly rather than serve them through the local distributing companies. It is the declared policy of Panhandle to secure as much of the load as direct as possible (See Public's Exhibit No. 2 and the testimony of Mr. Morton copied therefrom).

24. The development of its gas business in anything like its present proportion by Service Company has taken place almost wholly since natural gas was brought into Indiana by Panhandle, as hereinabove recited. This fact is illustrated by Service Company's Exhibit No. 1, which shows that for the year ended December 31, 1935, it had a total of gas customers of 41,245; whereas, at the year ended November 30, 1944, it had a total of such customers of 58,929 and that its average gas revenue per therm from residential customers went from \$.2374 in 1935 to \$.1576 for the twelve months period ended November 30, 1944 (See Service Company's "Exhibit No. 1").

25. It also appeared from Service Company's Exhibits No. 2 and 3 that if Service Company were to lose all of the gas revenues classified as industrial sales by reason of the pipe line company's furnishing the same, taking over those customers for direct service, it would mean loss, in gross revenue in excess of \$1,000,000 per annum based on figures for the twelve months period ending November 30, 1944, and for the same period, a loss in net operating income before provision for Federal Income Taxes of \$293,730.22. And it appeared from testimony of Mr. Schiesz that in the event of that contingency happening, Service Company would only be able to dispense with less than 2%

of its gas utility plant property. If Service Company's industrial load should be lost to it by reason of the industrial customers being taken over by Panhandle for direct service, only about \$100,000 of Service Company's investment in plant property could be retired and all of the remainder of its investment now devoted to gas service must be maintained and operated to serve Service Company's domestic and commercial users and the rates charged for service to the latter must necessarily be substantially increased to justify continuing the service to them. (Service Company's Exhibit No. 1 and testimony of Mr. Schiesz, pages 67-70 of Transcript.)

26. The fact that the distributing companies served natural gas to all three classes of gas consumers, i. e., industrial, commercial and domestic, has made possible a high standard of service at lower rates to the consumers in each of the three classes than would have been possible if only one of the classes had been served. It has meant that the residential and commercial consumers have had the benefit of natural gas which would have been denied them unless the distributing companies' business had included service to all three classes of consumers. The installation of facilities to serve industrial consumers has made possible the development of domestic uses, including cooking and water heating, the higher B. T. U. gas for house heating and the use of gas for commercial cooking purposes by restaurants, hotels and others. All of these services under old methods were prohibitive in cost or the gas was not available in the quantities in which the customers wished to use it, due to the

inadequacy of facilities and of the supply of gas. It was through the development by the distributing companies of the industrial business that they have been able to improve materially the over-all load factor of gas purchased. This has also enabled the distributing companies to spread their fixed costs, such as interest, taxes and depreciation, which are constant in every-day operation, over a larger number of units of service, which automatically has given the benefit of that condition and fact to each of the three classes of consumers and has made possible the development of rates for service which were attractive not only to one of the three classes but to each of them; all of which has had the effect of promoting greater public interest in the area served by these distributing companies in the use of natural gas and in advancing the public welfare in those areas. (Pages 60, 61, 63, 75, 82 of Transcript.)

27. It appears from Central Gas' Exhibit No. 1 and the testimony with reference thereto of Guy T. Henry, its President (see pages 71 to 77, both inclusive, of the Transcript) that for the calendar year ended December 31, 1944, the total gross revenues from sales of gas of Central Gas amounted to \$4,076,369.11; that its sale to industrial users grossed \$2,677,265.74; that for the same period its net operating income, before provision for Federal Income Taxes, amounted to \$683,393.58; that if Central Gas should lose all of its industrial customers by reason of their being taken over by Panhandle for direct service, it would have resulted in a loss in net revenues of \$514,206.67 (see Central Gas' "Exhibit No. 1" and the supporting sched-

ules); that if Panhandle were to take over all of the industrial customers of Central Gas for direct service, Central Gas would be able to retire only about 1% or 2% of its investment in plant property and would find it necessary to maintain and continue to use all of the remainder of its plant property in continuing to furnish service to its domestic and commercial customers; that Central Gas has approximately 26 industrial customers, each of which use in excess of twenty-five million cubic feet of gas per year, and which, in the aggregate, use approximately nine billion feet of gas per year and from which Central Gas obtains gross revenues of approximately two and one-half million dollars; that the 14 customers mentioned in Exhibit L to the Stipulation of Facts, being the Notice of Cancellation filed by Panhandle with the Federal Power Commission under date of May 18, 1943, were among such 26 industrial customers using approximately 90% of all of the gas sold by Central Gas to industrial customers; and that if Panhandle should take over this industrial business of Central Gas and serve the customers directly, it would certainly result in a substantial increase in the present rates of Central Gas to its domestic and commercial customers in order to enable it to continue to carry on its business and to pay a return on its investment.

28. It appears from Kokomo Company's Exhibit No. 1 and the testimony of its President and General Manager, Mr. Hahn, with reference thereto, that for the 12 months period ending December 31, 1944, its total gross revenues amounted to \$485,170.41, of which \$198,630.79 was derived from in-

dustrial sales; that if these industrial sales had been eliminated that year, it would have resulted in a reduction in net operating income, before provision for Federal Income Taxes, from \$128,157.86 to \$21,755.78, a total loss of \$106,402.08; that if the industrial business of Kokomo Company were taken over and served directly by Panhandle, the amount of plant property which Kokomo Company would be able to retire would be so slight as to be almost negligible, a matter of four or five thousand dollars; and that it would further result in a considerable revision of its present rates to domestic and commercial customers. (See Kokomo Company's "Exhibit No. 1" and "Exhibit No. 2" and the testimony with reference thereto of Mr. Hahn appearing on pages 78 to 90, both inclusive, of the Transcript.)

29. The use to which Panhandle is placing its facilities in Indiana and plans to place them in the future is shown by the following:

a. Panhandle has declared to Kokomo Company that "Panhandle desired, and was planning in the future, to make all industrial gas supply contracts" to large industrial users "direct with the industrial consumers; that some arrangement would have to be worked out whereby the interest of Kokomo Company in such gas sales would be continued, but the ultimate consumer would no longer be a customer of Kokomo Company, but would be a customer of Panhandle; that if Panhandle sold direct to Continental Steel Corporation, the sale would not come under the jurisdiction of the Federal Power Commission; and that

such was the chief objective of Panhandle in making such contract direct with the industrial consumers." (Stipulation of Evidence, Section 14.)

b. Panhandle solicited certain large industrial consumers of Service Company and stated to Service Company "that the Federal Power Commission had previously ruled that direct sales of gas to consumers of pipeline companies were not subject to regulation by such commission; that Panhandle desired to sell as much industrial load direct to industries as possible in order to remove this segment of its business from the jurisdiction of such commission; that Panhandle proposed to sell direct to industrial consumers at the points of inter-connection between the facilities of Panhandle and the present distributing utilities, that the facilities of the present distributing utilities would be utilized to transmit the natural gas for the account of the industrial consumers, who would reimburse the distributing utilities in an amount approximating the 20% of the rate being received by them on the sale of the interruptible natural gas; that present plans of Panhandle contemplated limiting the size of interruptible industrial consumers that Panhandle desired to serve direct to such consumers as had a monthly consumption of about 10,000,000 or more cubic feet of gas; and that he (Panhandle's representative) had been directed by Panhandle to outline the plan to the separate industrial consumers now served with interruptible gas by Service Company." Panhandle declared to Service Company and certain of its

industrial customers that Panhandle "intended to serve directly other large industrial gas consumers up and down the pipe line of Panhandle." (Stipulation of Evidence, Sections 15 and 16.)

c. Panhandle refused to make any contract with Central Gas for a supply of natural gas unless it "was based upon the policy that Panhandle should undertake at some time or other to serve directly some or all of these industrial consumers which are now being served by Central Indiana with natural gas purchased by Central Indiana Gas from Panhandle." (Stipulation of Evidence, Section 20); and Panhandle declared this policy in 1942 was the policy of the Board of Directors of Panhandle and that "its policy underlying that position, is to take over and serve directly such industrial customers which it refuses to serve through Central Gas". (Stipulation of Evidence, Section 21.)

d. The Chairman of the Board and the President of Panhandle both stated "that Panhandle was interested in securing directly certain industrial customers of Central Gas, but on some basis which would make such direct service by Panhandle outside the jurisdiction of the Federal Power Commission under the Natural Gas Act. Said Mr. W. G. McGuire (Chairman of the Board of Panhandle) stated at such conference that Panhandle was anxious to take over such business (direct sales to industrial customers) because it was an unregulated transaction both as to the Federal Power Commission, and the Public Service Commission of Indiana and that

he intended to establish industrial rates on a competitive fuel basis." Said representative of Panhandle stated that "Panhandle intended to take over direct service to certain large industrial consumers of Central Gas and any negotiations would have to be with that eventuality in mind". (Stipulation of Evidence, Section 23.)

e. Panhandle seeks to sell directly any industrial plant using natural gas in quantities agreeable to Panhandle and not to sell the gas to a distributing company for resale, and declares "it is our policy to serve as much of the load as direct as possible" and that "it is their policy to obtain any place on or adjacent to their system as much direct industrial gas as they can", because Panhandle contends such business is beyond regulation by any regulatory body or agency, thus enabling Panhandle to make as much money as possible from the business. (Transcript of Cross Examination of Oscar W. Morton, Rate Engineer for Panhandle, before Federal Power Commission on February 26, 1945, as shown at pages 44 to 46, inclusive, of Transcript of Proceedings.)

OPINION AND CONCLUSIONS

This investigation presents the basic problem of whether or not this Commission has *any* regulatory jurisdiction over direct sales of natural gas to Indiana consumers when such sales are made, under the circumstances shown in this record, by the company transporting the gas into the state from outside sources. No issue is here raised as to regulation of the transportation of gas into or through the state, or of the sale of such gas in the state to other public utilities for resale for ultimate public consumption for domestic, commercial, industrial or any other use. Regulatory control of such matters has been specifically committed to the Federal Power Commission by Section 1 (b) of the Natural Gas Act.

Nor is any issue presently involved as to any specific regulatory action by the Commission over the rates or service of Panhandle in Indiana in the case of sales direct to Indiana consumers other than the requiring of the filing of tariffs and reports. The fundamental question is whether the direct consumer sales of Panhandle are subject to regulation by this Commission in any respect. If so, it is clear, and the Commission does not understand that counsel for Panhandle dispute, that the tariffs of rates, rules and regulations for such service by Panhandle should be on file with the Bureau of Tariffs of the Commission and that annual reports of Panhandle should have been filed with the Commission.

✓ The facts establish, among other things, that indirectly, i.e. by sales for resale, Panhandle supplies gas generally for industrial use. Panhandle also, either from its main or branch lines, supplies gas directly to more than a score of consumers for industrial use, and is and has been active in seeking and securing where possible such consumers making direct purchases. The facts show its admitted intention of rendering direct service wherever large industrial customers can be obtained.

At the present time, Panhandle has direct service in Indiana to Anchor-Hocking. This direct service was commenced by Panhandle in 1942 by its taking over service to such customer from Indiana Gas, then an Indiana subsidiary of Panhandle, before Panhandle disposed of its full stock ownership in Indiana Gas.

The physical set-up under which this direct consumer sale is made should perhaps be briefly summarized here, since counsel for Panhandle rely heavily on this in asserting escape from the jurisdiction of the state.

The facts show that Panhandle brings gas into and through Indiana by means of high pressure transmission lines. The pressure in these lines vary from 250 to 600 pounds. From these main lines, extend branch or lateral lines, generally smaller in size than the main lines, and carrying gas at lower pressures than in the main line. One of these branch lines is the "Winchester line" by means of which gas is transported from a main line north (at pressures from 100 to 80 pounds per square inch) both for delivery to Anchor-Hocking and for delivery to

Indiana-Ohio Company for resale. The Winchester line was constructed in 1931, but until November 1934, when the sale of natural gas to Indiana-Ohio Company was commenced, the line was used wholly for the purpose of transporting gas sold to Indiana Gas for resale to Anchor-Hocking. Near the end of the Winchester line, that line, as presently constructed, branches, one branch leading to the meter house at the outlet side of which deliveries are made to Indiana-Ohio Company, and the other leading to the meter house at the outlet side of which deliveries are made to Anchor-Hocking. In the meter houses, among other things, pressures are reduced to those at which delivery is desired, which in the case of Anchor-Hocking, is in part at 40 pounds per square inch and in part at 10 pounds per square inch. Deliveries to Indiana-Ohio Company are at pressures ranging from 25 to 9 pounds per square inch depending upon the season of the year. In both cases, all the facilities (other than the real estate) up to the pipe at the outlet side of the meter house are owned and operated by Panhandle.

These physical facts are here outlined, not because the Commission deems them of any controlling importance in the decision of this cause, but because counsel for Panhandle have stressed them in their briefs and oral argument as physical factors establishing that the supply to Anchor-Hocking is in interstate commerce, which fact they argue precludes regulatory jurisdiction by the state. For reasons to be hereafter discussed, this

Commission believes that such views of counsel are untenable and based upon a misconception of controlling principles.

Counsel for Panhandle frankly conceded in their oral argument that unless Panhandle is immune from regulatory control of the State of Indiana because of the restrictions of the commerce clause of the federal constitution, it is subject to the regulation of this state as a public utility operating within the state. They strenuously urge, however, that interstate commerce provides Panhandle immunity from regulation until Congress acts. They assert that the Natural Gas Act shows a policy on the part of Congress to have direct consumer sales of natural gas unregulated if made in interstate commerce; and that, regardless of congressional intent, the direct industrial sales of Panhandle, as interstate commerce, are beyond the pale of any regulation by this Commission because of prohibitions imposed by the interstate commerce clause of the federal constitution.

The Commission believes there can be no question but that Panhandle's operations in Indiana are subject to its jurisdiction except to such extent as constitutional limitations or federal regulation prohibit such jurisdiction. The record here makes it indisputably clear that the business of Panhandle is that of furnishing, directly and indirectly, natural gas to and for the public. In such activity, and the devotion of its facilities thereto, it is a public utility both within the general sense of that term and within the specific definition thereof in the

Public Service Commission Act. As a public utility its rates and service are subject to governmental regulation. The question is only to what extent regulation by Indiana under its act may be applied in view of the interstate movement of the gas that finally reaches the consumer; and this investigation is limited to the situation only of supplying direct to consumers.

In their briefs, counsel for Panhandle asserted that no certificate of convenience and necessity was or could be required of Panhandle in respect of its direct consumer sales because of their interstate character. From this assumption they argued that this fact showed immunity from regulation under the state act. The Commission is not here required to pass upon the assumption made that a certificate can not be required by the State, for the reason that, because of the time the Anchor-Hocking service was commenced, there are no provisions of the Indiana statute which require any certificate as a condition precedent for the service. The existence of a certificate of necessity and convenience or any other franchise grant is not, however, the basis of regulatory control of public utility service by this Commission under the Public Service Commission Act. That act was passed to safeguard the public interest in respect of public utility service. It has been specifically construed by the Supreme Court of Indiana to have such broad purpose and scope, and to be not limited to regulation of utilities to whom certificates of public convenience and necessity have been granted. *City of*

Logansport v. Public Service Commission; 202 Ind. 523, 177 N. E. 249 (1931).

The Commission has concluded, after its consideration of this case, that neither counsel's position as to congressional policy nor their position as to the restrictive scope of the commerce clause of the federal constitution are tenable. The reason upon which these conclusions are based will be briefly discussed.

a. ~~The~~ Natural Gas Act and Congressional Policy.

The bill for federal regulation of natural gas transportation and sale, which was the basic pattern of the final Natural Gas Act, was introduced in Congress in 1936. It was the subject of extensive public hearings in 1936 and 1937 held by committees of the House of Representatives. (Report of Hearing by House of Representatives' Subcommittee of Committee on Interstate and Foreign Commerce held April 2, 3, 7, 14 and 15, 1936; Report of Hearing by House of Representatives' Committee on Interstate and Foreign Commerce held March 24-25, 1937). The bill as originally introduced contained jurisdictional provisions (Section 1 (b)) which were from the start of the hearings the subject of much debate as to the federal jurisdiction provided for. Under the original provision "high-pressure" and "low-pressure" mains were jurisdictional determinatives. The specific provision was:

"(b) The provisions of this Act shall apply to the transportation of natural gas in high-pressure

mains in interstate commerce and to natural-gas companies engaged in such transportation, but shall not apply to the distribution of natural gas moving locally in low-pressure mains or to facilities used for such distribution or to the production of natural gas: *Provided*, That nothing in this Act shall be construed to authorize the Commission to fix rates or charges for the sale of natural gas distributed locally in low-pressure mains or for the sale of natural gas for industrial use only."

Prior to the reporting out of the Bill by the Committee, Section 1 (b) underwent several changes. That section as sent to the House by the Committee, and as contained in the Natural Gas Act as passed, provides:

"(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

At the initial hearings, Mr. A. R. McDonald, Wisconsin Commissioner, Chairman of the Committee on Legislation of the National Association of Railroad and Utility Commissioners, presented a resolution of the association asking Congress to limit the federal rate regulation to the sale of natural gas for resale. In this

connection he pointed out that the pipe line companies were presently wholly unregulated only so far as they did not sell to the consumer but only to distributing companies, and asked that state regulation be not invaded by the legislation.

John E. Benton, Esquire, General Solicitor for the association, in discussing the association's resolution and proposed amendments, said that they were designed to make it clear that the Federal Act did not take from the states the regulation of rates on sales made direct to industrial customers. He said that the request of the association was

“based upon the fact that the United States Supreme Court has recognized that the distribution of gas locally to consumers either for domestic or industrial use, is a local business, and may be reached, controlled and regulated by local authorities, municipalities and states, as provided by state law, so long as Congress withholds its hand from regulation. The states can now regulate those rates to consumers until Congress enters that field and crowds the states out.”

Mr. Benton further said, after a discussion of the authorities:

“It was evidently the purpose of the one who drew the act to reserve to the State authorities the right to regulate the consumer rate, even though the consumer was an industrial user who received his supply in a high pressure main.”;

and stated that his amendment was to make it clear that

the proposed federal act did not apply to any consumer receiving gas for his own consumption "in either industrial or domestic use."

The issue of whether or not sales of gas for industrial use should be and were subject to governmental regulation was specifically brought to the fore during the hearings. The subsequent action of the House Committee leaves no room for real doubt that there existed a congressional intent that industrial sales should all be subject to governmental regulation, either state or federal.

At the 1937 hearings Mr. William A. Dougherty, a New York attorney connected with three of the largest pipeline companies and with other gas companies, proposed certain amendments to the Bill. The first of these was one which, he explained, was for the purpose of making it clear that no sales, direct or indirect, for industrial purposes were within the provisions of the legislation. Following this presentation, Mr. Benton asked, and was granted, leave to present written comments upon the suggested amendments. In opposing Mr. Dougherty's first suggestion and submitting his own proposed amendment for clarification of the matter, Mr. Benton, among other things, stated (Report of Hearings on March 24-25, 1937, p. 143):

"In this connection I point out that the exemption of industrial gas, as I understand your bill, is not for the purpose of exempting industrial gas from all regulation, but for the purpose of avoiding any

possible claim that because some industrial user may be taking a very large quantity of gas, service to him, on account of its wholesale character, should be considered subject to regulation by the Federal Commission.

"Service to an industrial user is just as much a local service, and within State jurisdiction to regulate until Congress acts, as is a sale to a householder for domestic use. Until Congress occupies the field, a sale for industrial use is accordingly subject to state regulation under the rule laid down in *Pennsylvania Gas Company v. New York Public Service Commission*, above cited.

"Sales for industrial use ought not to be exempt from all regulation, for the result may very well be that unjustifiable discrimination will result, and there will be no commission to which complaint may be made. Sales for industrial uses plainly ought to be subject to regulation by the same Commission which regulates sales to other classes of consumers, so that just and reasonable rates, for the several classes of service, properly related to each other, may be established. Under the bill as drawn, all consumer sales are exempt from Federal regulation and left to State regulation. The language of the suggested amendment just proposed leaves this purpose unaffected, and makes clear that the regulation of inter-company sales is designed for the protection of the consuming public, as a part of the complete regulation of the entire utility service."

In its initial report on the Natural Gas Act, made on May 13, 1936 (74th Cong., 2d Sess., Rep. No. 2651), the

Committee pointed out that the Bill exempted from the jurisdiction of the federal commission the sale of natural gas for industrial use, the states not being deprived by the federal act of any lawful authority over the distribution and sale of natural gas locally.

In the discussion of the general purposes of the proposed act, the report states:

"The main purpose of the bill is to provide for the regulation of the transportation and sale of natural gas in those cases in which the state regulatory bodies do not have jurisdiction. * * *

"Under the decisions of the United States Supreme Court rates charged in interstate wholesale transactions may not be regulated by the states. Such transactions are defined in the bill to mean sales of natural gas for resale. The Commission is given no jurisdiction over local rates even where the natural gas moves in interstate commerce. * * *

"The bill takes no authority from State Commissions and is so drawn as to be a complement, and is in no sense a usurpation, of State regulatory authority * * *. Mr. A. R. McDonald, chairman of the Committee on Legislation of the National Association of Railroad and Utility Commissioners, and Mr. John E. Benton, general solicitor of the National Association of Railroad and Utility Commissioners, appeared at the hearing before the sub-committee in support of the bill."

In its final report (75th Cong., 1st Sess., Report No. 709), made on April 28, 1937, which report was adopted

by the Senate Committee together with a recommendation that the Natural Gas Act be passed, the Committee stated:

"This bill is substantially identical with H. R. 12680 which, as amended, was reported by the Committee on Interstate and Foreign Commerce of the Seventy-fourth Congress, second session, with a recommendation that it pass. If enacted, the present bill would for the first time provide for the regulation of natural gas companies transporting and selling gas in interstate commerce. It confers jurisdiction on the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Company v. Public Service Commission* (1920), 252 U. S. 23). There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence

of Congressional action, not subject to State regulation. (See *Missouri v. Kansas Gas Company*, (1924) 265 U. S. 298, and *Public Service Commission v. Attleboro Steam & Electric Company*, (1927), 273 U. S. 83). The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

The report then refers to the fact that the regulation provided "takes no authority from state Commissions" but "complements" state regulatory authority, and that the states and the state commissioners' association favored the passage of the Natural Gas Act; and refers to the resolution filed by the association and the letter filed by John E. Benton, Esquire, its general counsel.

The report continues:

"Your commission believes that this legislation is highly desirable to fill the gap in regulation that now exists by reason of the lack of authority of the State Commissions."

Following the hearings the Bill, before being reported out by the Committee, was further revised to its enacted form and clearly gives the federal commission full rate and service regulatory jurisdiction over all gas sold for resale regardless of the purpose for which such gas is to be used by the consumer. The revised Bill continued the basic principle of non-interference with state regulatory jurisdiction in all direct consumer sales.

In cases arising under the Natural Gas Act the Supreme Court of the United States has had occasion to

review the legislative history of the statute and to point out the complementary nature thereof.

In *Public Utility Commission of Ohio v. United Fuel Gas Company*, 317 U. S. 456, 87 L. ed. 396 (1942), the court said, pp. 402-3:

"It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong., 2d Sess., pp. 1-3; H. Rep. No. 709, 75th Cong., 1st Sess., pp. 1-4; Sen. Rep. No. 1162, 75th Cong., 1st Sess."

And in *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 88 L. ed. 333 (1944); the court, through Mr. Justice Douglas, stated, p. 349:

"We pointed out in *Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, 314 U. S. 498, 506, 86 L. ed. 371, 376, 62 S. Ct. 384, that the purpose of the Natural Gas Act was to provide, 'through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas

moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation.' As stated in the House Report the 'basic purpose' of this legislation was 'to occupy' the field in which such cases as *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298, 68 L. ed. 1027, 44 S. Ct. 544, and *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83, 71 L. ed. 549, 47 S. Ct. 294, had held the States might not act. H. Rep. No. 709, 75th Cong., 1st Sess., p. 2. In accomplishing that purpose the bill was designed to take 'no authority from State commissions' and was 'so drawn as to complement and in no manner usurp State regulatory authority.' Id. p. 2. And the Federal Power Commission was given no authority over the 'production or gathering of natural gas.' § 1(b).

"The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. Due to the hiatus in regulation which resulted from the *Kansas Natural Gas Co.* Case and related decisions state commissions found it difficult or impossible to discover what it cost interstate pipeline companies to deliver gas within the consuming states; and thus they were thwarted in local regulation. H. Rep. No. 709, supra, p. 3. Moreover, the investigations of the Federal Trade Commission had disclosed that the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies. State commissions, independent producers, and communities having or seeking

the service were growing quite helpless against these combinations. These were the types of problems with which those participating in the hearings were preoccupied. Congress addressed itself to those specific evils."

And in his concurring opinion, Mr. Justice Jackson, referring to judicial determination of regulatory power, states, p. 370:

"Then came issues as to state power to regulate as affected by the commerce clause. *Public Utilities Commission v. Landon*, 249 U. S. 236, 63 L. ed. 577, 39 S. Ct. 268, PUR 1919C 834 (1919); *Pennsylvania Gas Co. v. Public Serv. Commission*, 252 U. S. 23, 64 L. ed. 434, 40 S. Ct. 279, PUR 1920E 18 (1920). These questions settled, the Court again was called upon in natural gas cases to consider state rate making claimed to be invalid under the Fourteenth Amendment."

It seems to this Commission it would be patently absurd to conclude that Congress in the Natural Gas Act, which regulated service and rates in cases of natural gas sold to a distributing utility for resale to industrial consumers, announced a policy that there was such a lacking of public interest in direct sales to industrial consumers that such sales should be free from regulatory control by any governmental agency. Again and again in the legislative history is the plain assertion that the existing regulatory gap was to be filled, and that it was to be filled without encroachment on state functioning. To torture that clear purpose into

an intention that a large segment of the distribution of gas was to be uncontrolled, if the device of direct consumer sales by pipe-line companies was resorted to, would be to disregard an intent that Congress has plainly shown, and to ignore applicable principles to the end that competition in public utility service, discrimination in such service; and rates for such service to a class of users shall be uncontrolled and that the ability of the state to protect the interests of such class and the other classes of gas users would be inescapably impaired. This Commission finds no basis in the federal constitution or in the history of the legislation or in the decisions of the Supreme Court of the United States for such a conclusion as has been urged. It finds in that history, and in the decisions of that court, and in the necessities of public interest, impelling reason to reject such contention. It finds in that history a clear showing that Congress recognized that all public utility sales of natural gas should be subject to regulation, and that by the Natural Gas Act it provided regulation within the full field in which, under the federal constitution, the states were powerless to act, but carefully preserved to the states full rate and service regulatory control in all other cases.

b. Commerce Clause of Federal Constitution, if Applicable, Would Not Prohibit State Regulation.

But counsel insist that, regardless of any congressional view that may be shown by the Natural Gas Act, constitutional prohibitions preclude state regulation of

the sales direct to Anchor-Hocking because the sales are in interstate commerce. Much argument can be expended, pro and con, on the question whether or not the sales of gas made direct to an industrial consumer under the factual circumstances shown in this case are sales in intrastate commerce or in interstate commerce. If the answer be sought wholly or primarily in physical characteristics, and logical consistency in the application of these physical characteristics is attempted, difficulties are soon encountered in the attempt to fix the line of demarcation. After careful study of the court decisions, this Commission is of the view that there is much in the opinions of the United States Supreme Court in *Missouri ex rel. Barrett v. Kansas Natural Gas Company*, 265 U. S. 298, 68 L. ed. 1027 (1924), *East Ohio Gas Company v. Tax Commission of Ohio*, 283 U. S. 465, 75 L. ed. 1171 (1931), and *Southern Natural Gas Corporation v. Alabama*, 301 U. S. 148, 81 L. ed. 970 (1937), and in its most recent opinion on this subject, *Connecticut Light & Power Company v. Federal Power Commission*, 323 U. S. —, 89 L. ed. Adv. Op. 691 (1945), to sustain the view that the direct industrial sales made by Panhandle, in the manner and under the circumstances shown by this record, are sales in intrastate commerce rather than sales in interstate commerce. See, also, the note by Professor Thomas Reed Powell on this subject in 58 Harvard Law Review 1072 (September 1945) for a careful analysis and illuminating discussion of this problem. The lower court decisions on which counsel for Panhandle rely on this point

seem to this Commission to have overlooked the basic principles as set forth and discussed by the Supreme Court of the United States in the cases above cited. Nor does this Commission think that the recent natural-gas cases decided by that court (*Colorado Interstate Gas Company v. Federal Power Commission*, 89 L. ed. Adv. Op. 807; *Colorado-Wyoming Gas Company v. Federal Power Commission*, 89 L. ed. Adv. Op. 831; and *Detroit et al. v. Panhandle Eastern Pipe Line Company*, 89 L. ed. Adv. Op. 836) can be deemed to represent either a reversal of those principles or a determination of the character of direct sales made in the manner shown by this record. Assuming the correctness of counsel's view that the court did characterize the industrial sales referred to in those cases as interstate ones, it is apparent from the issues and opinion that no problem of the exact character of the direct industrial sales was at issue since, be they interstate or intrastate, such sales were by the express provisions of the Natural Gas Act outside the jurisdiction of the Federal Power Commission. There is nothing in the opinions to indicate that the court had presented to it, or gave any consideration to, the factual characteristics attendant to those sales or tested them on the basis of its prior decisions pertinent to this point or considered them in the light of principles shortly thereafter announced in the *Connecticut* case.

This Commission is, of course, hesitant to decide controverted legal points when such decision can be avoid-

ed., although it will not shirk such duty when necessary as a basis for determining the duties placed upon it by the legislature. Fortunately, the issues of this investigation do not turn upon the interstate or intrastate character of the sales direct to the consumer. Whether those sales be interstate or intrastate, this Commission believes it has a regulatory control thereof. In the judgment of this Commission such sales, even if deemed interstate, are subject to state regulation because, the matter is one within that class where a predominate local interest admits of reasonable, non-discriminatory regulation or exercise of police power by the state until and unless Congress sees fit to assert its superior right of control.

This principle was early announced by the Supreme Court of the United States, and has been often restated and applied by it.

In the early case of *Wilson v. Blackbird Creek Marsh Co.*, 2 Peters 245, 7 L. ed. 412 (1829), the Supreme Court of the United States upheld an act of Delaware authorizing the construction of a dam across a navigable stream. Mr. Chief Justice Marshall stated, p. 414:

“The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States ‘to regulate commerce with foreign nations and among the several States.’

“If Congress had passed any Act which bore upon the case; any Act in execution of the power to regulate commerce, the object of which was to

control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, we should feel not much difficulty in saying that a State law coming in conflict with such Act would be void. But Congress has passed no such Act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question.

"We do not think that the Act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

And in *Copley v. Board of Wardens*, 12 Howard 299, 13 L. ed. 996 (1851), that court in upholding pilotage regulations by Pennsylvania said, pp. 1004-5:

"* * * we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress, did *per se* deprive the States of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any ease depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the States from

exercising an authority over its subject matter. If they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulations. *Sturges v. Crowninshield*, 4 Wheat. 193; *Moore v. Houston*, 5 Wheat. 1; *Wilson v. Black Bird Creek Marsh Co.*, 2 Peters 251.

“The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power.

But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

"Either absolutely to affirm, or deny, that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage, is plain. The Act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the

several States should deem applicable to the local peculiarities of the ports within their limits."

In the case of *Simpson v. Shepard (Minnesota Rate Cases)*, 230 U. S. 352, 57 L. ed. 1511 (1913), Mr. Justice Hughes, after a detailed discussion of the principles involved and the limitations on state authority, thus summarized the rule governing the regulatory power of the states as to interstate commerce, pp. 1542-3:

"But within these limitations there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. * * * Our system of government is a practical adjustment by which the national authority, as conferred by the Constitution, is maintained in its full scope, without unnecessary loss of

local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

In *Port Richmond etc. Ferry Company v. Board of Chosen Freeholders*, 234 U. S. 317, 58 L. ed. 1330 (1914), a case specifically upholding state regulation of rates for ferriage between two states, the basic principle was thus stated by Mr. Justice Hughes, pp. 1335-6:

"Coming, then, to the question now presented,—whether a state may fix reasonable rates for ferriage from its shore to the shore of another state,—regard must be had to the basic principle involved. That principle is, as repeatedly declared, that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive; that, in other matters, admitting of diversity of treatment according to the special re-

quirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and that, when Congress does act, the exercise of its authority overrides all conflicting state legislation. * * * It is this principle that is applied in holding that a state may not impose direct burdens upon interstate commerce, for this is to say that the states may not directly regulate or restrain that which, from its nature, should be under the control of the one authority, and be free from restriction save as it is governed by valid Federal rule. * * *

* * * The present question is simply one of reasonable charges. It is argued that the mere fact that interstate transportation is involved is sufficient to defeat the local regulation of rates, because, it is said, that it amounts to a regulation of interstate commerce. But this would not be deemed a sufficient ground for invalidating the local action without considering the nature of the regulation and the special subject to which it relates. * * * The fundamental test, to which we have referred, must be applied; and the question is whether, with regard to rates, there is any inherent necessity for a single regulatory power over these numerous ferries across boundary streams; whether, in view of the character of the subject and the variety of regulation required, it is one which demands the exclusion of local authority. Upon this question we can entertain no doubt. It is true that in the case of a given ferry between two states there might be a difference in the charge for ferriage from one side, as compared with that for ferriage from the other. But this does not alter the aspect of

the subject. The question is still one with respect to a ferry, which necessarily implies transportation for a short distance, almost invariably between two points only, and unrelated to other transportation. It thus presents a situation essentially local, requiring regulation according to local conditions. It has never been supposed that because of the absence of Federal action the public interest was unprotected from extortion, and that in order to secure reasonable charges in a myriad of such different local instances, exhibiting an endless variety of circumstance, it would be necessary for Congress to act directly, or to establish for that purpose a Federal agency. The matter is illuminated by the consideration of this alternative, for the point of the contention is that, there being no Federal regulation, the ferry rates are to be deemed free from all control. The practical advantages of having the matter dealt with by the states are obvious, and are illustrated by the practice of one hundred and twenty-five years. And in view of the character of the subject, we find no sound objection to its continuance. If Congress at any time undertakes to regulate such rates, its action will, of course, control."

And in 1920 this same basic principle was specifically held by the court to be applicable to regulation of rates for gas moving in interstate commerce and sold direct to consumers. *Pennsylvania Gas Company v. Public Service Commission*, 252 U. S. 23, 64 L. ed. 434 (1920), *supra*. In that case, the court, upholding state regulation concluded, p. 443:

"The thing which the state Commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the state of New York. * * *

"This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the states, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest, and has not been attempted under the superior authority of Congress."

It is interesting to note that, although in *East Ohio Gas Company v. Tax Commission of Ohio*, 283 U. S. 465, 75 L. ed. 1171, *supra*, the court disapproved the ruling of the *Pennsylvania* case that the sales direct to consumers were interstate sales, it carefully stated that the opinion in the *Pennsylvania* case was disapproved only "to the extent that it was in conflict" with the *East Ohio Gas* case decision holding the sales there involved to be intrastate in character.

In *Missouri v. Kansas Natural Gas Company*, 265 U. S. 298, 68 L. ed. 1027 (1924), the court, in denying state power to regulate sales of gas made for resale in interstate commerce and asserting such ruling was not inconsistent with its view in the *Pennsylvania* case and other decisions said, p. 1030:

"There is nothing in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, 64 L. ed. 434, P.U.R. 1920E, 18, 40 Sup. Ct. Rep. 279, inconsistent with this view. There the Gas Company, a Pennsylvania corporation, transmitted gas from Pennsylvania into New York, and sold it directly to the consumers. The service to the consumers, which was the thing for which the regulated charge was made, was essentially local, and the decision rests upon this feature. * * * The commodity, after reaching the point of distribution in New York, was subdivided and sold at retail. The Landon Case, so far as this phase is concerned, differs only in the fact that the process of division and sale to consumers was carried on, not by the Supply Company, but by independent distributing companies.

"In both cases the things done were local, and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the Landon Case. The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state, and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance."

In *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 86 L. ed. 754 (1942), the subject of state power where interstate commerce is involved was discussed by Mr.

Justice Reed, who, citing many authorities, summarized as follows, pp. 762-3:

"It has long been recognized that in those fields of commerce where national uniformity is not essential, either the state or federal government may act. *Willson v. Black Bird Creek Marsh Co.* 2 Pet (US) 245, 7 L ed 412; *California v. Thompson*, 313 US 109, 114, 85 L ed 1219, 1221, 61 S Ct 930. Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. But where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application.

"When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation."

In *Parker v. Brown*, 317 U. S. 341, 87 L. ed. 315 (1943), the court in upholding California regulatory legislation, thus stated upon this subject, pp. 332-3:

"When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that

commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. * * *

"Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct,' see *Di Santo v. Pennsylvania*, 273 US 34, 71 L ed 524, 47 S Ct 267, *supra*; cf. *Wickard v. Filburn*, 317 US 111, ante, 122, 63 S Ct 82, *supra*, not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause."

The Commission believes there can be no real doubt as to the importance and predominance of the local interest in the regulatory problems involved. The state is vitally interested in the welfare of its industrial gas

users as well as that of its residential and commercial users. It is, in the opinion of this Commission, a specious argument to assert that because competition with other fuels may fix a maximum rate level for such sales, there is no public interest in regulation of sales to such class of consumers. Obviously matters of discrimination, adequacy of service and the level of rates for such service are all ones which warrant and call for the exercise of governmental regulatory power in respect of this class as well as other classes. The further fact that regulation of distribution of gas to the industrial class of consumers cannot, in the public interest, be divorced from that of distribution to other classes of consumers is amply shown by the facts in the record in this case. The importance of these factors has been pointed out in the opinions in *Re Service Gas Company*, 15 P. U. R. (N. S.) 202 (Penn. 1936) and *Re Louisiana-Nevada Transit Company*, 32 P. U. R. (N. S.) 219 (Ark. 1939), cases before state commissions; and factors affecting the problem and calling for careful further legislative consideration, both state and federal, are the subject of an extensive analysis by Mr. Justice Jackson in his concurring opinion in *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 88 L. ed. 333, 358-376 (1944), *supra*.

The Commission concludes that the distribution in Indiana by Panhandle of natural gas direct to consumers is subject to regulation by this Commission under the laws of this state.

ORDER

IT IS THEREFORE ORDERED BY PUBLIC SERVICE COMMISSION OF INDIANA that each and all of the objections made by Panhandle Eastern Pipe Line Company, the respondent in this cause, to any of the evidence offered in this cause (except such objections as have heretofore been specifically and finally sustained by the Commission) shall be, and the same and each of them are hereby, overruled; and that all such evidence objected to shall be and is hereby received in evidence in this cause.

IT IS FURTHER ORDERED that said Panhandle Eastern Pipe Line Company shall, within twenty (20) days after receipt by it of a copy of this order, file with the Bureau of Tariffs of this Commission, in the form prescribed by this Commission, tariffs covering rates, rules and regulations appertaining to any and all sales of natural gas by it direct to ultimate consumers within the State of Indiana.

IT IS FURTHER ORDERED that said Panhandle Eastern Pipe Line Company shall, within sixty (60) days after receipt by it of a copy of this order, file with this Commission an annual report, in the prescribed form, for each of the calendar years 1942, 1943 and 1944, and shall hereafter, when and as the same become due and so long as it continues to distribute gas direct to any consumer in Indiana, file with this Commission, on the prescribed form, an annual report for each succeeding year.

IT IS FURTHER ORDERED that said Panhandle Eastern Pipe Line Company shall, within sixty (60) days after the receipt by it of a copy of this order, file with this Commission copies (certified by one of its fiscal officers as true copies) of (a) each and all statements appertaining to its property in such form as filed by it with the Federal Power Commission under and pursuant to Order No. 73 of said commission, adopted April 9, 1940, captioned "Order Requiring Submission of Supplemental Data in Connection with Gas Plant Instruction 2-D of the Uniform System of Accounts under the Natural Gas Act," and (b) each and all journal entries or proposed journal entries filed by it with said Federal Power Commission under and pursuant to the requirements of Subdivision B of Account No. 391 "Gas Plant Purchased" of the "Uniform System of Accounts Prescribed for Natural-Gas Companies Subject to the Provisions of the Natural Gas Act" prescribed by said commission, or of Subdivision B of Account No. 392 "Gas Plant Sold" of said Uniform Classification of Accounts.

IT IS FURTHER ORDERED that this Commission reserve for subsequent determination in this investigation the matter of what, if any, additional reports and information in respect of the property or operations of said Panhandle Eastern Pipe Line Company this Commission should require to be filed with it by said company.

IT IS FURTHER ORDERED that this Commission

reserve for subsequent determination in this investigation the steps, if any, to be taken by this Commission if Panhandle shall, without first securing a Necessity Certificate under the provisions of Section 97A of the Public Service Commission Act, commence the supplying of natural gas direct to any consumer in Indiana who was not so served by it on February '26, 1945, and who is located in a rural area as defined in said act.

IT IS FURTHER ORDERED that the secretary of this Commission shall promptly after the entry of this order (a) mail, first class and registered mail, to said Panhandle Eastern Pipe Line Company at its principal office in Indiana, 601 Illinois Building, 17 West Market Street, Indianapolis 4, Indiana, and also at its principal executive office at 135 South LaSalle Street, Chicago 3, Illinois, copies of this order and of the rules and regulations of this Commission governing the construction and filing of schedules of rates, rules and regulations by public utilities other than interurban railways, (b) mail, as printed matter, postage prepaid and insured, to said Panhandle Eastern Pipe Line Company at its said office in Chicago, Illinois, six sets of the form of annual report prescribed by this Commission, and (c) mail, as first class mail and postage prepaid, to counsel of record for said Panhandle Eastern Pipe Line Company, and to each of the other parties to this proceeding and their respective counsel of record, copies of this order; and that said secretary shall forthwith thereafter file in this cause his certificate of such mailings.

IT IS FURTHER ORDERED that said Panhandle Eastern Pipe Line Company shall, on or before twenty (20) days after the date of this order, pay into the Treasury of the State of Indiana, through the Secretary of this Commission, the sum of \$23.59, said amount being the expenses incurred by this Commission in this investigation (including cost of publication of notices of hearing).

YODER, CARLSON AND CANNON CONCUR:

APPROVED: November 21, 1945.

APPENDIX "D"**SUPPLEMENTAL ORDER OF THE PUBLIC SERVICE COMMISSION
OF INDIANA**

April 9, 1946

**BEFORE THE PUBLIC SERVICE COMMISSION OF
INDIANA**

In the Matter of the Investigation by the Commission in Respect of the Distribution by PANHANDLE EASTERN PIPE LINE COMPANY, as a Public Utility, of Natural Gas to Consumers within the State of Indiana.

Cause No. 16741

First Supplemental Order

Approved: April 9, 1946

By the COMMISSION:

On November 21, 1945, this Commission entered its order (Original Order) in the above entitled cause wherein, among other things, it ordered the respondent herein, Panhandle Eastern Pipe Line Company (Panhandle), within times prescribed in such order, to file with the Bureau of Tariffs of the Commission tariffs covering rates, rules and regulations appertaining to any and all sales of natural gas by it direct to ultimate consumers within the State of Indiana, and to file with the Commission certain designated annual reports, and to file with the Commission certain information appertaining to the plant and property of Panhandle. Panhandle did not comply with any of the provisions of the Original Order, but on or about January 2, 1946 took an appeal (the Appeal) from said order to the Randolph Circuit Court. The Appeal was docketed as Cause No. 5440 in said court.

On March 21, 1946 respondent filed in this Cause No. 16741 a document captioned "Offer of Respondent to Fur-

nish Information Designated by Commission Order Dated November 21, 1945, on Condition that the Same be Accepted by the Commission as Information only and that Said Order Dated November 21, 1945 be so modified as to State Unequivocally that it Involves no Assertion of any Jurisdiction or Authority of the Commission to Regulate the Business of Respondent of Selling and Directly Delivering Natural Gas Transported in Interstate Commerce to Industrial Consumers in the State of Indiana, and Seeks the Filing of the Reports and Documents Designated in Said Order for Information Purposes Only" (Respondent's Offer). The content of Respondent's Offer is as follows:

"Comes now Panhandle Eastern Pipe Line Company and respectfully shows this Honorable Commission:

"1. That this Respondent has at all times throughout this proceeding asserted and insisted, and continues to assert and insist, that it is engaged solely in interstate commerce in the State of Indiana, that this Commission consequently has no jurisdiction of Respondent or its business, and that any statute of Indiana construed to purport to confer such jurisdiction as applied to Respondent and its business is void because in violation of Article I, Section 8 (3) of the Constitution of the United States.

"2. That Respondent has asserted and continues to assert such position in the proceeding to set aside and vacate such order in Cause No. 5440 in the Randolph Circuit Court entitled *Panhandle Eastern Pipeline Company v. The Public Service Commission, et al.*, which cause has been heretofore tried in said Court and taken under advisement.

"3. That at the time said action was commenced Respondent in good faith understood and believed and still believes that said order dated November 21, 1945 constituted and constitutes an assertion of the right and authority to regulate the rates and service of Respondent in its business of selling and directly deliver-

ing natural gas transported in interstate commerce to certain industrial consumers as shown by the record in said cause which business Respondent contends is protected from such regulation by Article I, Section 8 (3) of the Commerce Clause.

"4. That this Commission has not asserted by arguments and brief in said action in the Randolph Circuit Court that the papers and documents which Respondent is ordered to file by said order dated November 21, 1945 are sought by it for information purposes only and not as an assertion of jurisdiction to regulate Respondent's rates and service for direct sales and deliveries to industrial consumers within the State of Indiana.

"5. Respondent denies that the Commission is authorized by law to require the filing of the papers and documents ordered filed by said order dated November 21, 1945 for the reason that the same are not relevant to the exercise of any jurisdiction which the Commission possesses and no part of the business of Respondent is subject to its jurisdiction. However, Respondent has no desire to withhold from the Commission any matters designated in said order which are desired solely for information purposes, even though the preparation and filing of the same hereafter will be burdensome to Respondent, *provided* the filing of the same would in no way prejudice its position that the Commission has no jurisdiction or authority to regulate its said business in the event that any attempt to regulate the same should hereafter be made by the Commission. In view of the assertions heretofore made in said order and now made by the Commission in arguments and briefs in said cause in the Randolph Circuit Court that the Commission has such regulatory jurisdiction, Respondent cannot be certain that it would not be prejudiced in said position if it should comply with the order as now entered unless the Commission by modification thereof specifically states in its order that

said papers and documents are sought for information purposes only, and that said order is not to be construed as an assertion of any regulatory jurisdiction of Respondent or its business.

"6. Respondent therefore now offers to file with the Commission all papers and documents specified in the order dated November 21, 1945, *provided* the Commission desires the same for information purposes only and not as an assertion of regulatory jurisdiction of Respondent's business, and *provided* said order is so modified or such further order is entered by the Commission as to preclude the possibility of any contention hereafter that

Respondent will be in any manner prejudiced in its right to contest the jurisdiction of the Commission to regulate its said business in the event the Commission shall hereafter assert the right, power, authority or jurisdiction to regulate the same.

"7. In the event that the order of the Commission dated November 21, 1945 is so modified or such further order is entered as to protect Respondent from any prejudice in its right to contest hereafter the jurisdiction and authority of the Commission to regulate its said business in the event that the Commission shall hereafter assert the right, power, authority or jurisdiction to regulate the same, Respondent will furnish the information designated in said order dated November 21, 1945 within such reasonable time as shall be designated by the Commission and will dismiss said action now pending in the Randolph Circuit Court without prejudice and at its costs.

"8. While Respondent is willing to afford the Commission a full opportunity to consider and accept or reject the proposal herein made, attention is called to the fact that the time for filing Respondent's reply brief in said cause in the Randolph Circuit Court will expire on Thursday, March 28, 1946 and that said cause will then be ready for decision by that Court."

On or about March 28, 1946 Panhandle filed in the Appeal its application for leave to file a supplemental complaint relative to Respondent's Offer.

The Commission certainly has no desire that any of the parties to this cause, or the court before whom the Appeal is pending, or any consumer, public utility or other interested person, should be in any doubt as to the conclusions to which the Commission came in this cause as to its regulatory jurisdiction over sales direct to Indiana consumers of natural gas that has moved into the state in interstate commerce. The Commission thought that position was made as clear as language could make it by the findings and opinion in the Original Order. Though not required by statute to incorporate in an order either findings or opinion, the Commission did in the Original Order, because of the importance of this matter and to the end that the parties should be fully informed as to its conclusions, set forth in detail both its findings and its opinion as to its regulatory control. After an extended discussion of its views, the Commission said unequivocally therein (p. 82) that it concluded "that the distribution in Indiana by Panhandle of natural gas direct to consumers is subject to regulation by this Commission under the laws of this state". Those laws place on the Commission, as the state regulatory agency, the power and duty, whenever action is necessary in the public interest, to make reasonable regulations of rates and service. This duty the Commission proposes to exercise when and as public interest requires action. The conclusion above quoted did and does express its position on this question.

The Commission has consistently reiterated this position in two other regulatory proceedings in each of which Panhandle was a party or had representatives present.

In *Panhandle Eastern Pipe Line Company, et al.*, Docket Nos. G-661 and G-688 before the Federal Power Commission, being proceedings involving the question whether Panhandle would be permitted by regulatory authorities to transport through its pipe line system large additional amounts of gas to be sold to a new industrial consumer, the Commission intervened in the interest of the consumers in

the State of Indiana and opposed the use of the pipe line for such transportation on the ground that such system did not have sufficient capacity even to supply adequately existing consumers. In the hearing in those proceedings in January 1946, the federal commission called for, and the full federal commission listened to, arguments on the jurisdictional issue in which the Commission, as an intervenor, participated. In that argument the Commission stated:

“ . . . The Indiana Commission believes that the Natural Gas Act has completely closed the gap in the regulation of gas moving in interstate commerce for public distribution.

“Assuming adequate state law, we believe that between the States and the federal agency the entire field has been covered. We have given much and careful consideration to the question of the division of federal and state regulatory powers in this interstate gas field, and it is our studied conviction that we have been entrusted, under the powers remaining with us under our state statutes, with the full and complete regulation of all direct sales to consumers, residential, commercial or industrial, of natural gas moving in interstate commerce.

“This jurisdiction, we believe, extends both to the consumer rates and service of such sales, and includes the control and regulation by the State of those facilities of movement, metering and regulating which appertain *solely* to the direct customer service.

“On the other hand, we recognize fully your own jurisdiction and control over the *interstate transportation* of all such gas by the natural gas company, (1) until and including the sale in cases of sale for resale, and (2) up to and including the point where the gas is broken out of the interstate stream and placed in facilities used solely for the local sale, in cases of gas sold direct. For example, in a direct industrial sale by a pipe line company, such as the one in issue here, it is our view that the facilities beyond the valve take off in the transmission line are facilities of the

local service and subject to state control; but that the facilities before such point, including the valve and other facilities used in the breaking out from the interstate stream of the gas to be sold to a consumer direct, are facilities subject to your jurisdiction and control.

"And we recognize, too, your full control and jurisdiction of the gas while in its interstate movement even though it is to be sold direct to a consumer; and your full right and power to determine the question of whether or not such facilities used or useful for that interstate transportation may in the public interest be used to move such gas to the point where our regulation begins, or must, because of prior rights of other consumers, inadequacy of facilities or other adequate causes, be used for other transportation.

"We believe this construction of the line of demarcation between state and federal powers is the one fixed by the Natural Gas Act. We believe the point of division of powers between you and us has been wisely so placed.

"We believe that under that division you have the full and complete authority in the instant case to determine whether or not this volume of gas which Panhandle Eastern Pipe Line Company proposes to sell direct can be brought to, or broken out at, the point where state regulation would pick up.

"We are confident that in exercising that jurisdiction and determining the issues, you will give fair and full consideration to the rights and protection of all areas and all classes of consumers along this pipe line who are dependent upon its capacity for such gas as they need to meet their requirements for this essential public utility service. • • •"

The Commission also participated on February 19 and 20, 1946, at the Chicago hearings in the general Natural Gas Investigation (Docket No. G-580), which is now being conducted by the Federal Power Commission. At that hearing, Panhandle had representatives present. The Com-

mission there again stated its position as to its regulatory power over gas sold direct to Indiana consumers as follows:

"* * * Adequate regulation of this supply, giving assurance that it will be available to consumers in the state, continuously and in adequate amounts, at fair and reasonable prices, and without unwarranted discriminations either between classes of users or those within a class, is of vital importance to the welfare of the state and its citizens.* * *

"We believe that the transportation and sale of natural gas is a business affected with a public interest, that it is inherently and necessarily, if economic waste is to be avoided, generally monopolistic in character, and that full and adequate regulation thereof is essential if the public interest is to be protected. We believe this regulation and protection can best be afforded and local interests best dealt with through the existing policy of the Natural Gas Act of leaving to state regulative authority the control over rates and service in cases of all direct consumer sales, and placing in the federal agency the full control over the interstate transportation of the gas and over its sale for resale. We believe the public interest can and will be best served through the cooperative efforts of these agencies as each functions within its own sphere.* * *

"As we have before said, we believe that Congress has left with each state the control and regulation of direct sales to consumers within such state. We think, state law being adequate, this regulatory power exists in cases of all classes of direct service to consumers, residential, commercial and industrial, small or large. We believe the unification of regulation of all direct consumer sales in the state regulatory agency is a wise and sound one, and one that the legislative history of the Natural Gas Act shows clearly to have been the congressional intent. We think that this line of demarcation of regulatory control is clearly one permitted by the federal constitution and that it should be fully preserved in any legislation amendatory to the act."

Appearing as a participant in that hearing, the Commission further stated in answer to specific questions relative to direct consumer sales, as follows:

"In fact, our Commission has gone on record, as most of you probably well know, holding that we have legislative authority which we propose to exercise governing all sales, irrespective of whether those sales are from a distributing utility or direct sales from a pipe line."

The position of the Commission, as determined from its investigation in this cause, was and is that it has jurisdiction over sales direct to consumers by Panhandle of natural gas that has moved into the state in interstate commerce; that Panhandle has the duty and obligation to file with the Commission, and keep on file, the tariffs, reports and accounting information required of public utilities by the statutes of the State of Indiana and the Commission's rules and regulations now in effect or from time to time promulgated; that the only lawful rates, rules and regulations for natural gas service by Panhandle direct to consumers in Indiana would be those filed by Panhandle with the Bureau of Tariffs of the Commission and in effect pursuant to the provisions of the Public Service Commission Act and the Commission's rules and regulations promulgated thereunder; contained in such tariffs, reports and other data for any and all lawful purposes necessary or advantageous in the performance by it of its duties and responsibilities as the state regulatory agency of public utility services; and that the Commission will, if, when and as the public interest requires, regulate rates and service of natural gas sales by Panhandle direct to Indiana consumers, and believes that it has authority so to do.

For some reason counsel for Panhandle, in their brief and in their oral argument in the Appeal, asserted that the Commission has no use for and does not need the information required to be filed by the Original Order for any purpose or use other than the regulation of sales to industrial consumers; and counsel have dogmatically asserted that "if no such right of regulation exists, the order made

is unlawful and should be vacated and set aside." (Bf. P. 9.) Such statements are not correct factually, and in the opinion of the Commission, the conclusion of counsel is wholly erroneous. The actual experience of the Commission in connection with the two federal proceedings above referred to have amply demonstrated to it the need of such and other information for numerous purposes. Members of the Attorney General's staff both in their oral argument and in their subsequent brief in the Appeal demonstrated the fallacy of counsel's claim and pointed out some of these purposes. Counsel apparently now wants that demonstration translated into an abandonment of the Commission's expressed position of regulatory power. The Commission has been particularly concerned lest failure to reiterate its position might be taken as silent approval of their assertions. Such an assumption would be opposite to the fact, but the Commission has concluded it should affirmatively point this out in acting on Respondent's Offer.

The Commission seeks the information directed to be filed by the Original Order for any and all uses to which it may be put by the Commission in the exercise of its statutory functions and the performance of its duties. Its use will not be limited to rate and service regulation of direct sales to Indiana consumers, but this broader use will not exclude the use for rate and service regulation of such sales. An example of this broader use appears in connection with the two proceedings above referred to. Certain of the information needed for participation in those proceedings, and for determination of the necessity of such participation, would have been available if the Original Order had been complied with. Experience in those proceedings also has shown a necessity for broadening the information called for in annual or periodic reports. The importance to the public of a continuous check on natural gas pipe line capacity and use has been strongly impressed on the Commission by the experiences of the past winter. Action by regulatory agency in advance of an actual break-down of service is a greater aid to the public than remedial action after break-down. Conditions arising this winter have spot lighted the essentialness of

vigilance by the state regulatory agency if an adequate supply of gas is to be had for Indiana consumers. Severe, and what the Commission believes to have probably been arbitrary and discriminatory, curtailments in the gas supply to Indiana industrial consumers using gas from the Panhandle system, were made by Panhandle during this past winter. The complaints to the Commission by such curtailed consumers, and their reports as to the affect of the curtailments on the production operations and employment in their establishments, convinced the Commission of the seriousness of the situation from the public standpoint. It actively sought and obtained assistance from the Federal Power Commission in respect of lessening these curtailments. During the same period facts came to light which disclosed that Panhandle was attempting to take on an additional large industrial load on its system. The supplying of such load would have seriously impaired the existing service to industrial consumers in Indiana. On behalf of the consuming public, the Commission appeared as intervenors in the investigation of the Federal Power Commission of this matter (Dockets No. G-661 and No. G-688), but most of the factual information had to be developed from examinations and studies of transmission capacities and loads which was in the files of the Federal Power Commission, and this handicapped the Commission in discovering the problem and dealing with it.

The position of the Commission is that its functions include, when and as necessary in the public interest, the regulations of rates and service in cases of sales directly to Indiana consumers. There are many purposes and uses, in the exercise of the regulatory and other duties placed upon the Commission by law, for which the Commission shall undoubtedly make use of the data which are required to be supplied now and from time to time by Panhandle under the Indiana statute and the Original Order. Some of those uses were pointed out by the Attorney General both in his oral argument and in the brief subsequently filed. It is not necessary to repeat or expand the list. The uses which will be made of the information supplied will be all such as the public interest require. Certainly without the information the Commission is and will be

handicapped in the exercise of many of its regulatory functions and the public, in whose interest the Commission functions, is injured thereby.

The Commission desires to add a word as to the reservation in the Original Order relative to further action by the Commission if Panhandle undertook to sell gas direct to DuPont without complying with Section 97A of the Public Service Commission Act. The issue in such supplemental investigation would involve the provisions of Section 97A of the Act, and issue additional to those dealt with in the Original Order. Panhandle had not at the time of the hearings or the order commenced any service to DuPont. In such a situation, the Commission had no power to order anything in respect of DuPont at that time. The Commission was not called upon to assume that, in the light of the views expressed in the Original Order, Panhandle would ignore the state and commence direct service to DuPont merely upon its own ideas of the scope of Section 97A. Panhandle could have submitted that question to the Commission for determination before it commenced the service, and it can still do so if it sees fit. In any such petition, Panhandle can assert a lack of jurisdiction, and any order made, if not acceptable to Panhandle, is appealable to the Courts. Such procedure is not unknown to Panhandle. Panhandle took exactly that kind of a course in an application to the Federal Power Commission which is docketed as Docket No. G-693 and in which docket the Commission was a party intervenor. But with the State of Indiana, Panhandle saw fit to ignore the statutory provisions, and saw fit to commence the service and then advise the Commission that it had done so. In that situation, Panhandle has, with its eyes open, assumed the risks of the course it selected. There is nothing in the Original Order that in any way creates or increases that risk. If, however, Panhandle does not see fit promptly to file a petition for a Necessity Certificate under Section 97A, the Commission proposes to proceed at the earliest date consistent with its other duties and the demands made by them upon it and its staff, with an investigation of the status of Panhandle's DuPont service in the light of Section 97A.

It is therefore ordered by the Public Service Commission of Indiana that the request contained in Respondent's Offer that the Commission modify, change or limit the scope of the Original Order be and the same is hereby denied; that Respondent's Offer be, and the same is hereby, rejected by the Commission; that a conditional filing, as proposed by Panhandle in Respondent's Offer, of the tariffs of rates, rules and regulations, the annual reports and the accounting information, or any of them; required to be filed by Panhandle by and under the Original Order will not constitute compliance with the Original Order, and that the tariffs of rates, rules and regulations, the annual reports and the accounting information, when filed, shall be deemed to be on file for, and to be available for use by the Commission for, all purposes and uses required or permitted by the provisions of the Public Service Commission Act and the rules and regulations of the Commission promulgated thereunder, including, but without limitation, the use thereof in and in connection with the regulation of rates and service appertaining to the supplying of natural gas by Panhandle direct to consumers within the State of Indiana.

It is further ordered that the Secretary of the Commission shall promptly after the entry of this first supplemental order (a) mail, first class and registered mail, to Panhandle at its principal office in Indiana, 601 Illinois Building, 17 West Market Street, Indianapolis 4, Indiana, and also at its principal executive office at 135 South LaSalle Street, Chicago 3, Illinois, copies of this first supplemental order, and (b) mail, as first class mail and postage prepaid, to counsel of record for Panhandle, and to each of the other parties to this proceeding and their respective counsel of record, and to the honorable judge of the Randolph Circuit Court at Winchester, Indiana, copies of this first supplemental order; and that said Secretary shall forthwith thereafter file in this cause his certificate of such mailings.

Yoder, Carlson, and Cannon concur. Approved:
April 9, 1946.

I hereby certify that the above is a true and correct copy of order as approved. —, —, Secretary to Commission.

APPENDIX "E"

Indiana Acts 1913, ch. 76, Sec. 97 as added by Acts 1945, ch. 53, Sect. 1, p. 110 (Burns' Ind. Stat. Ann. 1933, 1945 Pocket Sapp. Sect. 54-601a):

Chapter 53

An Act to amend an act entitled "AN ACT concerning public and municipally owned utilities, authorizing municipalities to hold, own, acquire, construct and operate utilities and to issue bonds to pay therefor, providing the manner in which such municipalities may acquire and pay for such utilities, abolishing the railroad commission of Indiana and conferring the powers of the railroad commission on the public service commission," approved March 4, 1913, as said title was amended by Chapter 190 of the Acts of 1933, approved March 8, 1933, by adding thereto a new section numbered section 97a, providing for the granting, transfer and revocation of certificates of public convenience and necessity for the rendering of gas utility service direct to consumers in rural areas in the State of Indiana, and declaring an emergency. (H. 295. Approved February 26, 1945.)

Public Service Commission Act—New Section—Section 97A—Meaning of Terms—Concerning Granting, Transfer and Revocation of Certificates of Public Convenience and Necessity for Gas Utility Service Direct to Consumers in Rural Areas—Amendment.

Section 1. Be it enacted by the General Assembly of the State of Indiana: That the above entitled act be and is hereby amended by adding thereto, immediately following section 97 thereof, a new section to read as follows:

Sec. 97A. (a) When used in this section, unless the context otherwise requires

(1) the term "gas" means and includes natural gas, artificial or manufactured gas, and mixed gas, or any of them;

(2) the term "necessity certificate" means a certificate of public convenience and necessity issued by the commission

pursuant to the provisions of this section, which certificate shall be deemed an indeterminate permit;

(3) the term "rural area" means territory within the State of Indiana that is outside the corporate limits of a municipality;

(4) the term "gas utility" means and includes any public utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the State of Indiana for his, its or their domestic, commercial or industrial use; and

(5) the term "gas distribution service" means the furnishing or sale of gas directly to any consumer within the State of Indiana for his or its domestic, commercial or industrial use.

(b) It is hereby declared that in order adequately to protect the public interest in the distribution of gas to consumers within the State of Indiana, it is necessary and desirable that to the extent provided herein the holding of necessity certificates should be required as a condition precedent to the rendering of gas distribution service in rural areas of the State of Indiana.

(c) After the date that this section becomes effective, no gas utility shall commence the rendering of gas distribution service in any rural area in the State of Indiana in which it is not actually rendering gas distribution service at the effective date hereof, without first obtaining from the commission a necessity certificate authorizing such gas distribution service, defining and limiting specifically the rural area covered thereby, and stating that public convenience and necessity require such gas distribution service within such rural area by such gas utility; and no gas utility hereby required to hold a necessity certificate for any rural area shall render gas distribution service within such a rural area to any extent greater than that authorized by such necessity certificate or shall continue to render gas distribution service within such rural area if and after such necessity certificate has been revoked or transferred as in this section provided.

(d) Whenever any gas utility proposes to commence the rendering of gas distribution service in any rural area

in which it is not actually rendering such service at the date on which this section becomes effective, it shall file with the commission a verified application for a necessity certificate covering such service by it. The commission shall, by regulations, prescribe the form of application and such application shall conform to such prescribed form. Within a reasonable time after the filing of any such application the commission shall fix a time and place for public hearing thereon. Notice of such hearing shall be given in such manner and to such persons as is from time to time required by law or by the regulations of the commission. Such hearing shall be held in the manner prescribed for a hearing in sections 57 to 71, both inclusive, of this act, and the provisions of such sections so far as applicable shall apply to such hearing. Any person interested in such proceedings, including without limiting the generality of the foregoing any gas utility rendering gas distribution service within the general service area (including territory within and without municipalities) of which the rural area covered by the application may reasonably be deemed a part, shall be permitted to appear either in person or by attorney and offer evidence in support of or opposition to the application. The applicant shall, at all times, have the burden of proving by evidence each of the matters hereinafter specified as necessary to be found by the commission before a necessity certificate shall be issued by it. If the commission shall find from the evidence, including such evidence, if any, at the commission may cause to be introduced as a result of any investigation which it may have made relative to the matter, that the applicant therefor has lawful power and authority to obtain such necessity certificate and to render the proposed gas distribution service if it obtains such certificate, that he or it has the financial ability to provide the proposed gas distribution service, that public convenience and necessity require the rendering of the proposed gas distribution service, and that the public interest will be served by the issuance of the necessity certificate to him or it, the application shall be granted, subject to such terms, restrictions and limitations as the commission shall determine to be necessary and desirable in the public interest; otherwise the application shall be denied.

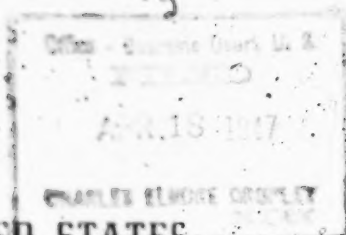
(e) Upon approval by the commission given after notice and public hearing given and held in the manner provided for in subdivision (d) of this section in cases of applications for necessity certificates, but not otherwise, any necessity certificate may (1) be sold, assigned, leased or transferred by the holder thereof to any person, firm or corporation to whom a necessity certificate might be lawfully issued, or (2) be included in the property and rights encumbered under any indenture of mortgage or deed of trust of such holder.

(f) Any necessity certificate may, upon application by the holder thereof to the commission, be revoked by the commission, in whole or in part, after notice given and hearing held in the manner provided for in cases of applications for necessity certificates. Any necessity certificate may, after notice given and hearing held in the manner provided for in cases of applications for necessity certificates, be revoked by the commission, in whole or in part, for the failure of the holder thereof to comply with any applicable order, rule or regulation prescribed by the commission in the exercise of its powers under this act, or with any term, condition or limitation of such necessity certificate.

Emergency.

Sec. 2. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage.

FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1262

69

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

vs.

THE PUBLIC SERVICE COMMISSION OF INDIANA,
ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

STATEMENT OPPOSING JURISDICTION AND
MOTION TO DISMISS OR AFFIRM

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✓ FRANK E. COUGHLIN,
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INDEX

SUBJECT INDEX

	Page
Statement opposing jurisdiction	1
Prefatory statement	1
The record does not present for decision any substantial federal question	3
A—Appellant's contentions are foreclosed by previous decisions of this Court which support the decision of the Supreme Court of Indiana in this case	3
B—The decisions relied upon by appellant as presenting a substantial federal question are not in conflict with the decision of the Supreme Court of Indiana in this case	5
Summary	6
Motion to dismiss or affirm	9

TABLE OF CASES CITED

<i>Arkansas Gas Co. v. Department</i> , 304 U. S. 61	2, 3, 4
<i>Connecticut Light and Power Co. v. Federal Power Commission</i> , 324 U. S. 515	6
<i>East Ohio Gas Co. v. Tax Commission</i> , 283 U. S. 465	5
<i>Freeman v. Hewitt</i> , 67 Sup. Ct. 274	5
<i>Illinois Natural Gas Co. v. Central Illinois Public Service Co.</i> , 313 U. S. 498	6
<i>Missouri ex rel. Barrett v. Kansas Natural Gas Co.</i> , 265 U. S. 298	5
<i>Morgan v. Virginia</i> , 328 U. S. —, 90 L. Ed. 982	6
<i>Natural Gas Pipe Line Co. v. Slattery</i> , 320 U. S. 300	4
<i>Pennsylvania Gas Co. v. Public Service Commission</i> , 225 N. Y. 398, 122 N. E. 260, 252 U. S. 23	4, 6
<i>Public Service Commission v. Attleboro Steam and Electric Co.</i> , 273 U. S. 83	5

<i>Senn v. Tile Layers' Union</i> , 301 U. S. 468	Page 5
<i>Southern Natural Gas Corp. v. Alabama</i> , 301 U. S. 148	4, 5
<i>Southern Pac. Co. v. Arizona</i> , 325 U. S. 761	6

STATUTES CITED

Constitution of the United States, Article I, Section 8	6
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1262

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

vs.

THE PUBLIC SERVICE COMMISSION OF INDIANA,
LEROY E. YODER, LAWRENCE E. CARLSON, AND
LAWRENCE W. CANNON, AS MEMBERS OF THE PUBLIC
SERVICE COMMISSION OF INDIANA, INDIANA GAS &
WATER COMPANY, INC., CENTRAL INDIANA
GAS COMPANY, NORTHERN INDIANA PUBLIC
SERVICE COMPANY, KOKOMO GAS & FUEL COM-
PANY, SOUTHERN INDIANA GAS & ELECTRIC
COMPANY, AND GREENFIELD GAS COMPANY, INC.,
Appellees.

**STATEMENT OF MATTERS AND GROUNDS BY AP-
PELLEES, THE PUBLIC SERVICE COMMISSION OF
INDIANA, AND THE MEMBERS THEREOF MAKING
AGAINST THE JURISDICTION OF THIS COURT.**

Prefatory Statement

The appellant, hereinafter called the Panhandle, is a large pipe line company which transports natural gas from the Texas-Kansas fields across several middle west states including Indiana. The appellee Commission regulates public utilities in Indiana. The Panhandle has furnished gas to a number of local gas utilities in Indiana for some

time for resale to industrial, commercial and residential consumers, and recently has announced its intention to serve gas directly to industrial users—some of whom have been served by the local utilities in Indiana. One particular industrial user is the Anchor-Hocking Glass Company at Winchester, Indiana, the service to which by Panhandle directly precipitated this litigation. The direct service to industrial users is not within the jurisdiction of the Federal Power Commission.

The Indiana Commission on October 13, 1944 entered upon an investigation of Panhandle, and after extended hearings it concluded it had jurisdiction over the Panhandle in so far as it was furnishing natural gas directly to industrial users in Indiana. On November 21, 1945, the Indiana Commission issued its order, which is being attacked by Panhandle, requiring Panhandle to file with the Commission (1) Its tariffs covering rates, rules and regulations pertaining to sales of natural gas by it *direct* to industrial consumers in Indiana, (2) Its annual reports for the years 1942, 1943, 1944, and each year thereafter, and (3) Copies of statements pertaining to its property filed with the Federal Power Commission.

Appellant Panhandle then filed an action in the Circuit Court at Winchester, Indiana, asking for a court review of said order of the Commission. In such action appellant Panhandle asserted that it was not a utility within the meaning of the Indiana statutes, and that said order violated the commerce clause of the Federal Constitution.

In the proceeding before the court at Winchester, the attorneys for the Commission contended that the order of the Commission merely requiring the filing of certain information did not obstruct or materially interfere with appellant's interstate business and cited the case of *Arkansas Gas Co. v. The Department*, (1938), 304 U. S. 61. Appellant then filed with the Indiana Commission on March 21, 1946,

a written offer to furnish to the Commission the information required in the order of November 21, 1945 upon the condition that the Commission would modify its order to state that the Commission desired the information "for information purposes only" and not as an assertion of regulatory jurisdiction over appellant Panhandle. This offer followed the pattern of the Arkansas Gas Company in the case of *Arkansas Gas Co. v. The Department*, 304 U. S. 61.

The Indiana Commission, on April 3, 1946, rejected the conditional offer of the Panhandle and made a supplemental order stating that the information required by its order would be deemed to be on file for all purposes and uses required or permitted by the provisions of the Public Service Commission Act including, but without limitation, the use thereof in connection with the regulation of the rates and services pertaining to the supplying of natural gas by Panhandle direct to consumers within the State of Indiana.

On May 11, 1946, the Circuit Court at Winchester, Indiana, set aside and vacated the original and supplemental order of the Indiana Commission. On appeal the Supreme Court of Indiana reversed the judgment of the Winchester Circuit Court and held valid the order and supplemental order of the Commission. Appellant Panhandle appeals to this court from the decision of the Indiana Supreme Court.

The Record Does Not Present for Decision Any Substantial Federal Question

A.

Appellant's Contentions Are Foreclosed by Previous Decisions of This Court Which Support the Decision of the Supreme Court of Indiana in This Case.

Appellant's assignments of error *in toto* claim in substance that the order of the Public Service Commission of

Indiana, dated November 21, 1945, and the statutes of Indiana under which such order was made are invalid as violating Article I, Section 8 (3) (Commerce Clause) of the Constitution of the United States. The validity of an order of a regulatory Commission of the type here involved was before this Court in the case of *Arkansas Gas Co. v. Department* (1938), 304 U. S. 61 and *Natural Gas Pipe Line Company v. Slattery* (1937), 302 U. S. 300. In both cases this Court held said orders to be valid and not to violate the commerce clause of the Federal Constitution.

More specifically, appellant in its assignment of errors claims that the Indiana Commission had no authority to assert power to regulate the rates at which appellant furnishes natural gas directly to industrial consumers. A complete answer to this contention is that the Commission's order did not fix a rate, nor even attempt to, nor even fix a rate hearing. If the Commission's order suggests a rate question, this question also has been before this Court and decided adversely to appellant. (See the cases of *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23 (see also opinion of Judge Cardozo, 225 N. Y. 397; 122 N. E. 260) and *Southern Natural Gas Corp. v. Alabama* (1937), 301 U. S. 148.) This same principle sustaining State regulation of rates was also discussed by this Court in the case of *Illinois Natural Gas Co. v. Central Illinois Public Service Co.* (1941), 313 U. S. 498; and in an exhaustive law review article written by Professor Powell of Harvard Law School in 58 Harvard Law Review, pages 1072, 1082, 1084, and 1089.

Appellant also claims in its assignment of errors that the Indiana Supreme Court erred in holding that appellant is a public utility within the meaning of the Indiana statutes. This is a matter of statutory construction and the decision of the Indiana Supreme Court on this question is binding

on this Court. (*Senn v. Tile Layers' Union* (1936), 301 U. S. 468, 477.)

This Court has upheld the power of States to tax the type of activities engaged in by the appellant in this case. (*Southern Natural Gas Corp. v. Alabama* (1937) 301 U. S. 148; *East Ohio Gas Co. v. Tax Commission* (1931), 283 U. S. 465). This Court has also recently held that the power to tax is a dominant power over commerce and that attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations over aspects of such commerce. (*Freeman v. Hewitt* (1946), 67 S. Ct. (Adv. Ed.), 274.)—Certainly a sustaining by this Court of the power of a State to tax activities similar to those which appellant is engaging in in this case would *a fortiori* compel a sustaining of the police regulation of the type involved in this case.

B.

The Decisions Relied Upon by Appellant as Presenting a Substantial Federal Question Are Not in Conflict With the Decision of the Supreme Court of Indiana in This Case

The cases of *Missouri ex rel. Barrett v. Kansas Natural Gas Co.* (1924), 265 U. S. 298 and *Public Service Commission v. Attleboro Steam and Electric Co.* (1927), 273 U. S. 83, merely held that the transportation of gas through pipe lines from one State to another, for sale to *distributing companies for resale* to ultimate consumers is interstate commerce precluding State regulation. The instant case before this Court does not involve sales to distributing companies for resale, but sales direct by Panhandle to ultimate industrial consumers in Indiana. At present the Federal Power Commission is expressly authorized to regulate sales by Panhandle to distributing companies for re-

sale. The distinction between the type of activities involved in the two foregoing cases relied upon by appellant, and the type of activity involved in the instant case is clearly pointed out by this Court in the case of *Connecticut Light and Power Co. v. Federal Power Commission* (1945), 324 U. S. 515, 526.

The cases of *Morgan v. Virginia* (1946), 328 U. S. —, 90 L. Ed. (Adv. Op.) 982, 985 and *Southern Pac. Co. v. Arizona*, 325 U. S. 761, 769 clearly are inapplicable here. This Court in these two cases held that the commerce clause of its own force precluded any State regulations because national uniformity in the type of activity therein involved was absolutely necessary in order to insure the free flow of interstate commerce. That such national uniformity is not required in this case is clearly evidenced by the fact that Congress failed to include such activity within the provisions of the Federal Natural Gas Act, and failed to authorize the Federal Power Commission to regulate such activity. Moreover, the commerce involved in the two foregoing cases relied upon by appellant was not consummated in the particular States attempting to regulate, but continued on into other States. In the instant case the regulation involved applies to an activity which comes to an end in the State of Indiana and does not continue to other States. (See *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23; *Illinois Natural Gas Co. v. Central Illinois Public Service Co.* (1941), 314 U. S. 498; 58 Harvard Law Review 1072, 1082, 1084 and 1089.)

Summary

As heretofore shown, the order of the Indiana Commission being attacked does not violate the Commerce Clause of the Federal Constitution and the decision of the Supreme Court of Indiana in this case is in accord with previous

7

decisions of this Court, and there is no valid basis for distinguishing this case from the decisions in which this Court established such principles. Consequently, there is no substantial Federal question involved—and thus appellees' motion to dismiss or affirm, filed herewith, should be sustained.

(Signed) CLEON H. FOUST,
Attorney General of Indiana;

(Signed) FRANK E. COUGHLIN,
1st Deputy Attorney General;

(Signed) KARL J. STIPHER,
Deputy Attorney General;
Counsel for Appellees.

URBAN C. STOVER,
Special Assistant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1262

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

vs.

THE PUBLIC SERVICE COMMISSION OF INDIANA,
ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

**MOTION OF APPELLEES, THE PUBLIC SERVICE
COMMISSION OF INDIANA AND THE MEMBERS
THEREOF TO DISMISS, APPEAL OR AFFIRM DE-
CISION OF STATE COURT.**

Now come appellees, The Public Service Commission of Indiana, Leroy E. Yoder, Lawrence E. Carlson, and Lawrence W. Cannon, as members of The Public Service Commission of Indiana, and move to dismiss the appeal herein on the ground that the case presents no substantial Federal question; and they further move, if the motion to dismiss is not granted; that this Court affirm the decision of

the Supreme Court of Indiana on the ground that the questions upon which the decision of this cause depends are so unsubstantial as to need no further argument; all as appears in the Statement of Grounds Making Against the Jurisdiction of this Court, filed herewith.

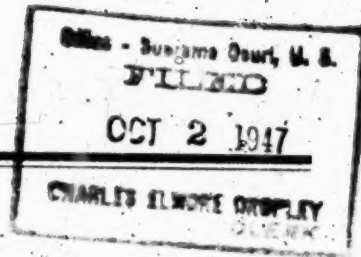
(Signed) CLEON H. FOUST,
Attorney General of Indiana;

(Signed) FRANK E. COUGHLIN,
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(Signed) KARL J. STIPHER,
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Counsel for Appellees.

URBAN C. STOVER,
Special Assistant.

FILE COPY



IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. 69

PANHANDLE EASTERN PIPE LINE COMPANY,

Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF INDIANA, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

APPELLANT'S BRIEF

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
State Statutes, the Validity of Which is Involved	2
Questions Presented	6
Statement of the Case	6
The Proceedings Before The Commission	7
The Commission's Order of November 21, 1945 ..	11
Review Proceedings in the Circuit Court of Randolph County, Indiana	13
Necessity of Uniformity with Respect to Curtail- ment or Interruption of Service	14
The Intervening Distributing Companies	15
Specification of Errors	15
Summary of Argument	16
Argument	23
I. Summary of Pertinent Decisions	23
II. Principles to be Applied	35
III. The Business Sought to be Regulated is Inter- state Commerce	41
IV. The Business is of Paramount National Con- cern and Requires Uniform Regulation by a Single Authority, if Regulation is to be Im- posed	43
V. Local Interest in the Protection of Local Utili- ties or their Customers from Competition by Interstate Pipe Line Companies or their Local Consumers from Higher Rates as a Result of Such Competition does not Author- ize Local Regulation	53
VI. The Natural Gas Act	57
Conclusion	65
Appendix	67

Table of Authorities

CASES	PAGE
Arkansas Louisiana Gas Co. v. Dep't. of Public Utilities (1938), 304 U. S. 61, 82 L. Ed. 1149	16, 31, 59
Baldwin v. Seeng (1935), 294 U. S. 511, 79 L. Ed. 1032	21, 55
Barrett, Missouri ex rel. v. Kansas Natural Gas Co. (1924), 265 U. S. 298, 68 L. Ed. 1027	16, 20, 21, 25, 39, 45, 47, 49, 55
Binderup v. Pathe Exchange (1923), 263 U. S. 291, 68 L. Ed. 308	19, 43
Buck v. Kuykendall (1925), 267 U. S. 307, 69 L. Ed. 623	21, 48
Bush & Sons Co. v. Maloy (1925), 267 U. S. 317, 69 L. Ed. 627	21, 48
Cities Service Co., State ex rel. v. Public Service Commission (1935), 337 Mo. 809, 85 S. W. (2d) 890, cert. den. (1936), 296 U. S. 657	29
Colorado Interstate Gas Co. v. Federal Power Commission (1945), 324 U. S. 581, 89 L. Ed. 1206	33, 63
Colorado-Wyoming Gas Co. v. Federal Power Commission (1945), 324 U. S. 626, 89 L. Ed. 1235	43, 59
Columbia Gas & Electric Corp. v. United States (C.C. A. 6, 1945), 151 F. (2d) 461, cert. den. (1946), 91 L. Ed. (adv. op.) 45	34
East Ohio Gas Co. v. Tax Commission (1931), 283 U. S. 465, 75 L. Ed. 1171	16, 26
Freeman v. Hewitt (1946), 329 U. S. 249, 91 L. Ed. (adv. op.) 205	19, 20, 41, 43, 46, 55
Hooven & Allison Co. v. Evatt (1945), 324 U. S. 652, 89 L. Ed. 1252	18, 37

	PAGE
Illinois Natural Gas Co. v. Central Illinois Public Service Co. (1942), 314 U. S. 498, 86 L. Ed. 371	19, 27, 31, 42, 49
Interstate Natural Gas Co. v. Federal Power Commission (June 16, 1947), 91 L. Ed. (adv. op.) 1355	19, 33, 42
Interstate Natural Gas Co. v. Louisiana Public Service Commission (D. C. La. 1940), 34 F. Supp. 980	34
King Mfg. Co. v. City of Augusta (1928), 277 U. S. 100, 72 L. Ed. 801	3
Memphis Natural Gas Co. v. Beeler (1942), 315 U. S. 649, 86 L. Ed. 1090	27
Missouri ex rel. Barrett v. Kansas Natural Gas Co. (1924), 265 U. S. 298, 68 L. Ed. 1027	16, 20, 21, 25, 39 45, 47, 49, 55
Morgan v. Commonwealth of Virginia (1946), 328 U. S. 373, 90 L. Ed. 1317	20, 43, 45
Northwestern Bell Telephone Co. v. Nebraska State Ry. Comm. (1936), 297 U. S. 471, 80 L. Ed. 810	3
Panhandle Eastern Pipe Line Co. v. Federal Power Commission (1945), 324 U. S. 635, 89 L. Ed. 1241	33
Pennsylvania v. West Virginia (1923), 262 U. S. 553, 67 L. Ed. 1117	17, 21, 24, 55
Pennsylvania Gas Co. v. Public Service Commission (1920), 252 U. S. 23, 64 L. Ed. 434	16, 25, 59
Peoples Natural Gas Co. v. Public Service Commission (1926), 270 U. S. 550, 70 L. Ed. 726	49
Postmaster-General v. Early (1827), 12 Wheat. 136, 6 L. Ed. 577	58
Prudential Insurance Co. v. Benjamin (1946), 328 U. S. 408, 90 L. Ed. 1342	58
Public Utilities Commission v. Attleboro Steam & Electric Co. (1927), 273 U. S. 83, 71 L. Ed. 549	16, 20, 21, 39, 45, 54

	PAGE
Public Utilities Commission v. Landon (1919); 249 F. S. 236, 63 L. Ed. 577	24
Public Utilities Commission v. United Fuel Gas Co. (1943), 317 U. S. 456, 87 L. Ed. 396	32, 49, 59, 64
Roland Electric Co. v. Walling (1946), 326 U. S. 657, 90 L. Ed. 383	17, 36
Schollenberger v. Pennsylvania (1898), 171 U. S. 1, 43 L. Ed. 49	18, 37
Sioux City v. Missouri Valley Pipe Line Co. (N. D. Iowa, 1931), 46 F. (2d) 819	27
Southern Natural Gas Corp. v. Alabama (1937), 301 U. S. 148, 81 L. Ed. 970	29
Southern Pacific Co. v. Arizona (1945), 325 U. S. 761, 89 L. Ed. 1915	20, 43, 45, 58
State ex rel. Cities Service Co. v. Public Service Com- mission (1935), 337 Mo. 809, 85 S. W. (2d) 890, cert. den. (1936), 296 U. S. 657	29
State Corporation Commission v. Wichita Gas Co. (1934), 290 U. S. 561, 78 L. Ed. 500	49
State Tax Commission v. Interstate Natural Gas Co. (1931), 284 U. S. 41, 76 L. Ed. 156	19, 29, 42
United States v. Rock Royal Co-operative (1939), 307 U. S. 533, 83 L. Ed. 1446	19, 41
Walling v. Jacksonville Paper Co. (1943), 317 U. S. 564, 87 L. Ed. 460	18, 19, 40, 43
West v. Kansas Natural Gas Co. (1911), 221 U. S. 229, 55 L. Ed. 716	24
Ex Parte Williams (1928), 277 U. S. 267, 72 L. Ed. 877	3
Williams v. Bruffy (1878), 96 U. S. 176, 24 L. Ed. 716	3

COMMISSION CASES

Re Colorado Interstate Gas Co. (Colo. P. U. C. 1933), P. U. R. 1933E, 349	28
In the Matter of Panhandle Eastern Pipe Line Co. and Michigan Consolidated Gas Co. (F. P. C. 1946), 63 P. U. R. (N. S.) 213	50

U. S. CONSTITUTION

Art. I, Sec. 8, Cl. 3	
-----------------------------	--

STATUTES

Indiana Public Service Commission Act; Indiana Acts 1941, c. 101, p. 255; Ind. Stat. Ann. (Burns' 1933 and 1945 Supp.), secs. 54-101, et seq.	2
Indiana Acts 1933, c. 190, sec. 1, p. 928; Ind. Stat. Ann. (Burns' 1933), sec. 54-105	3, 48
Indiana Acts 1933, c. 190, sec. 4, p. 933; Ind. Stat. Ann. (Burns' 1933), sec. 54-203	5
Indiana Acts 1915, c. 110, sec. 1, p. 457; Ind. Stat. Ann. (Burns' 1933), sec. 54-212	5
Indiana Acts 1913, c. 76, sec. 21, p. 175; Ind. Stat. Ann. (Burns' 1933), sec. 54-215	5
Indiana Acts 1925, c. 64, sec. 1, p. 210; Ind. Stat. Ann. (Burns' 1933), sec. 54-216	5
Indiana Acts 1913, c. 76, secs. 27, 28, p. 177; Ind. Stat. Ann. (Burns' 1933), secs. 54-221 to 54-223	5
Indiana Acts 1913, c. 76, sec. 41, p. 180; Ind. Stat. Ann. (Burns' 1933), sec. 54-313	5
Indiana Acts 1913, c. 76, sec. 45, p. 181; Ind. Stat. Ann. (Burns' 1933), sec. 54-317	5
Indiana Acts 1927, c. 146, sec. 1, p. 445; Ind. Stat. Ann. (Burns' 1933), sec. 54-402	6
Indiana Acts of 1933, c. 190, sec. 6, p. 935; Ind. Stat. Ann. (Burns' 1933), sec. 54-403	6
Indiana Acts 1933, c. 190, sec. 8, p. 941; Ind. Stat. Ann. (Burns' 1933), sec. 54-504	6
Indiana Acts 1913, c. 76, sec. 92, p. 196; Ind. Stat. Ann. (Burns' 1933), sec. 54-505	6
Indiana Acts 1945, c. 53, sec. 1, p. 110; Ind. Stat. Ann. (Burns' 1945 Supp.), sec. 54-601A ...	3, 4, 67

	PAGE
Indiana Acts, 1913, c. 76, sec. 99, p. 167; Ind. Stat. Ann. (Burns' 1933), sec. 54-603	5, 14
Judicial Code, sec. 237; 36 Stat. 1156, 43 Stat. 937, 45 Stat. 54; 28 U. S. C. A. sec. 344 (a)	2, 3
Natural Gas Act, 52 Stat. 821, et seq.; 15 U. S. C. A. secs. 717, et seq.	32, 57

MISCELLANEOUS

Hearings before Sub-Committee of the Committee on Interstate and Foreign Commerce, House of Representatives, on H. R. 11662 (April 1936)	60
Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, on H. R. 2185, H. R. 2235, H. R. 2292 and H. R. 2956 (April-May, 1947)	22, 51, 56, 61
House of Representatives Report No. 709, 75th Cong., 1st Sess.	50
House of Representatives Report No. 800, 80th Cong., 1st Sess.	62, 22, 51, 61, 62, 65

IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. 69

PANHANDLE EASTERN PIPE LINE COMPANY,

Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF INDIANA, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

APPELLANT'S BRIEF

Opinions Below

The opinion of the Supreme Court of Indiana (R. 196) has not been officially reported. It is unofficially reported at 71 N. E. (2d), 117 and at 67 P. U. R. (N. S., 1947) page 129. The opinion of the Circuit Court of Randolph County, Indiana is not reported. It appears as Appendix B of appellant's Statement As to Jurisdiction herein. The opinion of the Public Service Commission of Indiana, dated November 21, 1945 (R. 116) is not reported. Its first supplemental order, dated April 9, 1946 (R. 180) appears in 63 P. U. R. (N. S., 1946) at page 309.

Jurisdiction

The judgment below was entered February 5, 1947 (R. 196-213), and rehearing was denied March 25, 1947 (R. 220). The Order allowing appeal was entered March 25, 1947 (R. 228-229) and probable jurisdiction was noted May 19, 1947 (R. 235).

The jurisdiction of this Court was invoked under Section 237 of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. 344 (a)). The appeal is from a final judgment rendered by the highest court of the State of Indiana in which a decision could be had; there is drawn in question the validity of certain statutes of the State of Indiana on the ground of their being repugnant to the Constitution of the United States; and the decision is in favor of their validity.

State Statutes, the Validity of Which Is Involved

The state statutes, the validity of which was drawn in question and sustained in this suit, are:

(1) An order issued by the Public Service Commission of Indiana (hereinafter called "the Commission") November 21, 1945 (R. 116), as supplemented by a further order of the Commission issued April 9, 1946 (R. 180), asserting and exercising jurisdiction and authority to regulate, especially with respect to rates and service, appellant's interstate sales and deliveries, under individual contracts, of natural gas transported by pipe line from Texas and Kansas and delivered in Indiana directly to large industrial consumers.

(2) The Public Service Commission Act of Indiana (Ind. Acts 1941, c. 101, p. 255; Ind. Acts 1945, c. 46,

p. 92; Burns' Indiana Statutes Annotated, 1933, Sections 54-101 *et seq.*) and particularly that paragraph of Section 54-105 (Ind. Acts 1933, c. 190, Sec. 1, p. 928) which defines a "public utility" subject to the provisions of the Act and Section 54-601A (Chapter 53 of the Acts of the General Assembly of Indiana of 1945, referred to as "Section 97A of the Public Service Commission Act" by the Commission in its order).

(1) The Commission's order issued November 21, 1945, and the supplement thereto issued April 9, 1946, constitute a "statute" within the meaning of the term as used in Title 28, U. S. C., Sec. 344 (a).¹

(2) The Public Service Commission Act of Indiana provides a complete scheme of regulation of "public utilities" and vests authority in the Public Service Commission of Indiana to administer the Act and to issue final legislative orders having the force of law with respect to the business of persons coming within the term "public utility" as defined in Ind. Acts 1933, c. 190, Sec. 1, p. 928; Sec. 54-105, Burns' Indiana Statutes Annotated, 1933, Vol. 10, p. 335. On this section of the Act, the Commission based its jurisdiction to regulate appellant's interstate sales of natural gas to industrial consumers in Indiana. The Supreme Court of Indiana construed this section of the Act as sustaining such jurisdiction (R. 211). The pertinent paragraphs of this section of the Act read as follows:

"Section 54-105 (12672). *Definitions of Terms—Short title of act.* The term 'public utility' as used in this act shall mean and embrace every corporation,

¹ Williams v. Bruffy, 96 U. S. 176, 183; King Mfg. Company v. City of Augusta, 277 U. S. 100; Ex Parte Williams, 277 U. S. 267; Northwestern Bell Telephone Company v. Nebraska State Railway Commission, 297 U. S. 471.

company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, that now or hereafter may own, operate, manage or control any street railway or interurban railway or any plant or equipment within the state for the conveyance of telegraph or telephone messages, or for the production, transmission, delivery or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service either directly or indirectly to or for the public, but said term shall not include a municipality that may now or hereafter acquire, own, or operate any of the foregoing facilities.

"The term 'utility' as used in this act shall mean every street railway or interurban railway, and every plant or equipment within the state used for the conveyance of telegraph or telephone messages, or for the production, transmission, delivery or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service either directly or indirectly to the public."

Section 54-601A (Chapter 53 of the Acts of the General Assembly of Indiana of 1945) was, as stated in the opinion of the Supreme Court of Indiana (R. 211), "aimed directly at the natural gas business, and by the act a 'gas utility' was defined to mean and include 'any public' utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the State of Indiana for his, its, or their domestic, commercial or industrial use." Since it is comparatively short, this particular section of the Public Service Commission Act of Indiana is set forth in full as an Appendix hereto at pages 67-71. Its principal purpose appears to be to vest in the Commission control over competition in the sale of natural gas to industries through the requirement of a certificate of public convenience and necessity before any sale can

lawfully be made. However, Ind. Acts 1913, c. 76, sec. 99, p. 167 (Burns' Ind. Stat. Ann., 1933, Sec. 54-603) prohibits the granting, except to an Indiana corporation or citizen, of any license, permit or franchise to own, operate, manage or control any plant or equipment of any public utility. Appellant is a Delaware Corporation (R. 40).

Other provisions of the Act authorize the Commission to value all the property of every public utility (Sec. 54-203;² Ind. Acts, 1933, c. 190, sec. 4, p. 933); to require that a public utility shall keep all books, accounts, papers and records within the state and to prohibit their removal from the state without permission of the Commission (Sec. 54-212; Ind. Acts, 1915, c. 110, sec. 1, p. 457); to inspect and examine any and all books, accounts, papers, records and memoranda kept by such public utility (Sec. 54-215; Ind. Acts, 1913, c. 76, sec. 21, p. 175); to ascertain and determine the proper and adequate rates of depreciation of the several classes of property of each public utility (Sec. 54-216; Ind. Acts 1925, c. 64, sec. 1, p. 210); to supervise and regulate arrangements between a public utility and its customers or consumers or with its employees, such arrangements being unlawful unless approved by the Commission (Sec. 54-221; Ind. Acts 1913, c. 76, sec. 27, p. 177); and to fix rates, charges and regulations governing terms of service (Secs. 54-222 and 54-223; Ind. Acts 1913, c. 76, sec. 28, p. 177). The Act also provides that every public utility shall file its schedules of rates and terms of service with the Commission (Sec. 54-313; Ind. Acts 1913, c. 76, sec. 41, p. 180) and that no changes in schedules of rates and charges shall be made without approval of the Commission (Sec. 54-317; Ind. Acts 1913, c. 76, sec. 45, p. 181); confers upon the Commission extensive authority over management of the business and compensation of officers and

² Here, and in each subsequent citation in this paragraph, the first source given refers to the particular section of Burns' Ind. Stat. Ann. 1933, wherein the provision is codified.

employees of a public utility (Sec. 54-402; Ind. Acts 1927, c. 146, sec. 1, p. 445); confers upon the Commission extensive authority over the holders of the voting capital stock of all public utility companies under its jurisdiction, affiliated interests and contracts with affiliates (Sec. 54-403; Ind. Acts 1933, c. 190, sec. 6, p. 935); and confers upon the Commission extensive authority over the issuance and sale of bonds, notes or other evidences of indebtedness by a public utility and the application of the proceeds from the same (Secs. 54-504 and 54-505; Ind. Acts 1933, c. 190, sec. 8, p. 941; Ind. Acts 1913, c. 76, sec. 92, p. 196).

Questions Presented

Appellant seeks to vacate, and to enjoin the enforcement of, certain orders of the appellee Public Service Commission of Indiana (hereinafter called the "Commission"), held by the Supreme Court of Indiana (R. 199) to constitute an unequivocal assertion of power and jurisdiction to regulate rates and service with respect to the direct sale and delivery by appellant to large industrial consumers in Indiana, under individual contracts, of natural gas transmitted by appellant by interstate pipe line from the States of Texas and Kansas:

The basic question for decision is whether Article I, Section 8(3) of the Constitution of the United States, of its own force, denies such power and jurisdiction to the Commission and protects such sales by appellant from state regulation of the character attempted.

Subsidiary questions are presented by appellant's specification of errors (*post*, pp. 15-16).

Statement of the Case

Appellant owns and operates an interstate pipe line for the transmission of natural gas purchased or produced by it in Texas, Kansas, or Oklahoma, extending from gas

7
fields in Texas and Kansas through Oklahoma, Kansas, Missouri, Illinois and Indiana into Michigan and Ohio (Complaint, par. 2, R. 1 admitted by answer, par. 1, R. 21, Stip. Ptf's. Ex. 2, R. 41, 45, 46, 65).³ A map of the appellant's transmission system as of May 1, 1944 is included in the transcript (R. 66 A).

The Proceedings Before the Commission

On October 13, 1944 the Commission ordered a formal investigation of appellant's right to supply gas for consumption within the State of Indiana without complying with the requirements of the Indiana Public Service Commission Act relating to Public Utilities (Ind. Acts 1941, Ch. 101, p. 255; Burns' Ind. Stat. Ann. 1933, Sects. 54-101 *et seq.*) particularly with reference to filing with the Commission (a) tariffs, rules and regulations appertaining to natural gas service to consumers within the State of Indiana, (b) annual reports and (c) an original cost report appertaining to its property used and useful in rendering such service, and with reference to keeping books, accounts, papers, and records at an office within the State of Indiana (Ptf's. Ex. 2, R. 116 to 119).

Appellant promptly challenged the regulatory jurisdiction of the Commission with respect to its business, asserting that its sales to consumers in Indiana were wholly in

³ Plaintiff's (appellant's) Exhibit No. 2 (R. 37 to 116) is a part of the transcript of the proceedings before the Commission and includes certain stipulations entered into in that proceeding. Pursuant to the order allowing appeal (R. 228) the parties filed a stipulation designating only certain portions of the record for inclusion in the transcript on appeal (R. 229 to 233) which was approved by the Chief Justice of the Supreme Court of Indiana as conforming to the order (R. 234). That stipulation shows that all exhibits designated for inclusion in the record on appeal were admitted in evidence. The admission in evidence of Ptf's. Ex. 2 is so shown (R. 230).

interstate commerce and that any action or order of the Commission purporting to regulate or interfere with such sales would unlawfully burden interstate commerce in violation of Article I, Section 8 (3) of the Constitution of the United States (R. 120).

At that time appellant, in addition to its sales to local distributing companies for resale, was directly selling and delivering natural gas to twenty-three industrial consumers in the various states traversed by its pipe line but had only one such customer in Indiana, Anchor-Hocking Glass Corporation at its plant at Winchester, Indiana (Ptf's. Ex. 2, R. 46, 47), under a contract executed in 1942 (R. 81 to 86). While the proceeding was pending it entered into a contract to supply gas to E. I. DuPont DeNemours Company at its Fortville, Indiana plant.

The uncontroverted facts with reference to the delivery of gas to Anchor-Hocking are as follows:

Appellant's main line extends eastward to Zionsville, Indiana, where it branches into two lines. One branch runs through Muncie, Indiana, and thence east and slightly south into Ohio, passing a point approximately seven miles south of Winchester (Ex. C to Stipulation of Facts in Ptf's. Ex. 2, R. 66 A). From such point a lateral (Winchester lateral) runs directly north to property owned by Anchor-Hocking adjacent to Winchester which supplies gas both to Anchor-Hocking and to Indiana Ohio Public Service Company, a local distributing company supplying local consumers in and around Winchester, Portland and Union City in Indiana and Union City, Ohio. The Winchester lateral runs into two meter-houses a short distance apart on real estate owned by Anchor-Hocking. In each of such meter-houses the pressure is further reduced (a reduction from 200 lbs. to 100 lbs. is made when the gas enters the Winchester lateral) and the gas is delivered

at the outlet side of one meter-house to Anchor-Hocking for consumption, and at the outlet side of the other to Indiana-Ohio for resale. The meter-houses and the facilities therein (except the real estate) are owned by appellant. (Stip. Ptf's. Ex. 2, R. 52 to 55.) The agreement with Anchor-Hocking (Ex. N-1 to Stip. of Facts in Ptf's. Ex. 2, R. 81 to 86) provides (Par. 17, R. 85) that the gas sold thereunder will be delivered to the buyer at main or lateral line pressures without any reduction, except such as the seller deems necessary to facilitate measurement and delivery. Delivery to local distributing companies throughout appellant's system is made in many instances by laterals and in making deliveries to distributing companies generally over its system it maintains regulators at its town border metering stations and before delivery reduces the pressure to the extent desired by the distributing company to meet operating conditions in its system (Stip. R. 54).

Anchor-Hocking is the third largest manufacturer and distributor of glass containers in the United States, and its products, for the manufacture of which gas is used, are sold principally in interstate commerce (Stip. R. 47). The volume purchased by Anchor-Hocking in 1943 was 1,150,279 M.C.F., approximately ten times the volume sold to Indiana-Ohio Public Service Company for resale (Stip. Ptf's. Ex. 1, R. 35, 36, shown admitted in evidence, R. 230).

It was also stipulated that,

"... all of the natural gas delivered by Panhandle to Anchor-Hocking is gas transported from the States of Texas or Kansas by Panhandle for the purpose and with the intent on the part of Panhandle that gas so transported in the quantities sold to Anchor-Hocking shall be delivered to it" (Stip. Ptf's. Ex. 2, R. 65).

The DuPont contract, entered into while the proceeding was pending, was in all respects similar to the Anchor-Hocking contract (Ex. J-1 to Stipulation of Facts in Ptf's. Ex. 2, R. 67 to 73). Since that service required the construction of additional interstate transportation facilities, appellant filed with the Federal Power Commission an application under Section 7 of the Natural Gas Act (15 U. S. C. Sec. 717f) for a Certificate of Public Convenience and Necessity to construct a lateral to a point near the Town of Fortville, Indiana, to be used to deliver gas to two Indiana utilities for resale and to the DuPont Company for consumption (Stip. Ptf's. Ex. 2, R. 73 to 80). The Commission filed an answer in that proceeding asserting that the proposed sale to DuPont constituted intrastate commerce and that appellant had obtained no Necessity Certificate from the Commission to serve DuPont as required by Ch. 53, Acts of 1945, Indiana, effective as of February 26, 1945 (Appendix p. 68, *infra*) and had failed to file rate schedules, etc., with respect to service to Indiana consumers, and asked that the Certificate of the Federal Power Commission be denied unless conditioned to require appellant to obtain a Necessity Certificate from the Commission before rendering service to DuPont (Supp. Stip. of Facts in Ptf's. Ex. 2, R. 109 to 111). The Federal Power Commission issued its Certificate of Convenience and Necessity for the service to DuPont "without prejudice to the authority of the Indiana Commission in the exercise of any authority it may have over the sale or service proposed to be rendered by Panhandle Eastern to DuPont" (Exs. 2-4 to Supplemental Stip. of Facts in Ptf's. Ex. 2, R. 112 to 114). At the time of the issuance of the original order of the Commission on November 21, 1945 (R. 116 to 173) the facilities for service to DuPont had been constructed but service had not yet commenced. Such service was commenced thereafter (prior to the commencement of the review proceedings in the Circuit Court of Randolph County,

Indiana, described *infra*, pp. 13-14), without applying for a Necessity Certificate from the Commission (R. 130, 131, complaint par. 14, R. 16, admitted by answer par. 1, R. 21; Ex. A to Supp. Stip. of Facts in Randolph Circuit Court, R. 190, shown admitted in evidence R. 231). The facilities used for the delivery of gas to DuPont are in all respects similar to those used for delivery to the two local utilities for resale and are also similar to those used for delivery to Anchor-Hocking and Indiana-Ohio Public Service Company (R. 176).

It was stipulated that appellant had at no time in connection with its sale to Anchor-Hocking attempted to comply with the Public Service Commission Act of Indiana (Ind. Acts 1941, Ch. 101, p. 255, Burns' Indiana Stat. Ann. 1933, Sects. 54-101 *et seq.*) with respect to filing with the Commission tariffs of rates, rules or regulations relating to the sale of gas to Anchor-Hocking, an original cost report appertaining to any of its property in Indiana, or any annual or other periodic reports. Nor has it purported to keep books, accounts, papers or records in the manner required under the orders and directions of the Commission (Stip. R. 56).

The Commission's Order of November 21, 1945

On November 21, 1945, after a hearing, the Commission entered an order which, among other things, required appellant within a period fixed in the order to (1) file with the Bureau of Tariffs of the Commission, in the form prescribed by the Commission, tariffs covering rates, rules and regulations appertaining to any and all sales of natural gas by appellant direct to ultimate consumers within the State of Indiana; (2) file annual reports on forms prescribed by the Commission for 1942 and all subsequent years, so long as it continues to distribute gas direct to any

consumer in Indiana; and (3) file with the Commission copies of (a) each and all statements appertaining to its property in such form as filed by it with the Federal Power Commission under and pursuant to Order No. 73 of said Commission, adopted April 9, 1940, captioned "Order Requiring Submission of Supplemental Data in Connection with Gas Plant Instruction 2-D of the Uniform System of Accounts under the Natural Gas Act" and (b) each and all journal entries filed by it with said Federal Power Commission under and pursuant to the requirements of Subdivision B of Account No. 391 "Gas Plant Purchased" of the "Uniform System of Accounts Prescribed for Natural Gas Companies, subject to the provisions of the Natural Gas Act" prescribed by said commission or of Subdivision B of Account No. 392 "Gas Plant Sold" of said Uniform Classification of Accounts. The order further reserved for subsequent determination in said investigation the matter of what, if any, additional reports and information in respect of its property or operations appellant shall be required to file with the Commission (R. 172).

With reference to the service to DuPont without having secured a Necessity Certificate from the Commission under Acts 1945, Indiana, Ch. 53, p. 110, (Burns' Ind. Stat. Ann. 1933, 1945 Pocket Supp. Sect. 54-601 A, Appendix p. 67), the order provided that:

"It is further ordered that this Commission reserve for subsequent determination in this investigation the steps, if any, to be taken by this Commission if Panhandle shall, without first securing a Necessity Certificate under the provisions of Section 97 A of the Public Service Commission Act, commence the supplying of natural gas direct to any consumer in Indiana who was not so served by it on February 26, 1945, and who is located in a rural area as defined in said Act" (R. 173).

By its terms the Act of 1945 applies only to service rendered after "the date that this section becomes effective" and consequently does not apply to the sale to Anchor-Hocking.

Review Proceedings in the Circuit Court of Randolph County, Indiana

On January 11, 1946 appellant filed proceedings in the Circuit Court of Randolph County, Indiana to vacate and set aside the Commission's order and to enjoin the enforcement thereof (R. 1). While the cause was pending, appellant filed with the Commission a written offer to furnish all information designated by the Commission's Order of November 21, 1945 on condition that the same be accepted as information only without prejudice to appellant's right to contest any subsequent assertion of regulatory jurisdiction by the Commission. In a supplemental order entered by the Commission April 9, 1946, brought into the review proceedings by supplemental complaint (R. 25) and a supplemental stipulation (R. 178 to 191, admitted in evidence, R. 231), the offer was refused on the ground that such conditional filing would not constitute compliance with the Commission's order, and it was stated that "the tariffs of rates, rules and regulations, the annual reports and the accounting information when filed, shall be deemed on file for, and be available for use by the Commission for all purposes and uses required or permitted by the provisions of the Public Service Commission Act and the rules and regulations of the Commission promulgated thereunder, including, but without limitation, the use thereof in and in connection with the regulation of rates and service appertaining to the supplying of natural gas by Panhandle direct to consumers within the State of Indiana" (R. 190, 191).

With respect to the reservation in the original order as to service to DuPont without obtaining a certificate of

necessity and convenience under the 1945 Act, the supplemental order states that:

"If, however, Panhandle does not see fit promptly to file a petition for a Necessity Certificate under Section 97 A, the Commission proposes to proceed at the earliest date consistent with its other duties and the demands made by them upon it and its staff, with an investigation of the status of Panhandle's DuPont service in the light of Section 97 A."

On May 11, 1946, the Circuit Court of Randolph County entered judgment in favor of appellant (R. 30-31), which was reversed on appeal by the Supreme Court of Indiana (herein sometimes called "the court below") by its judgment entered February 5, 1947 (R. 196-213) from which this appeal is taken.

Necessity of Uniformity with Respect to Curtailment or Interruption of Service

Practically all sales to large industrial consumers, whether direct or through local distributing companies, are made on an interruptible basis, so that, in the event of an insufficiency of gas, such service may be reduced or cut off in order to supply what is known as "firm load," consisting of gas supplied primarily for resale to domestic and commercial consumers. (Stip. in Ptf's. Ex. 2, R. 50, R. 174). The procedure involved in cutting off part or all of the interruptible load is known in the industry as "curtailment" (R. 174). The evidence is uncontroverted that curtailment must be handled with reference to the system as a whole (R. 174, 175). Most of the pertinent facts are accurately stated in the opinion of the Supreme Court of Indiana (R. 196 to 198). That court, however, wholly ignored the evidence with reference to curtailment procedure and stated that there was nothing in the record to show that uniformity in the control of direct sales is necessary (R. 207).

The Intervening Distributing Companies

Certain Indiana public utilities purchasing gas from appellant for resale were permitted to intervene in the proceedings before the Commission and also in the review proceedings (R. 23, 121, 230) on the ground that each had a direct interest in sustaining the jurisdiction of the Commission to regulate the direct distribution and sale by appellant of natural gas to industrial consumers in Indiana, and they have actively participated throughout the proceedings. The Commission found that, if appellant should take over the industrial consumers of these local distributing companies, they would sustain substantial losses of revenue and could dispense with only a small fraction of their plant properties and that this would result in higher rates for their service to domestic and commercial users (R. 105 to 109). The Commission also found that appellant had made efforts to obtain direct sale industrial customers from the utilities and that its policy was to secure as much large industrial consumer business on or adjacent to its system as possible (R. 47 to 50). As will be apparent from the argument, appellant deems the matters so found insufficient to support state regulatory power over the interstate transactions involved, although the Supreme Court of Indiana characterized them as "a weighty consideration in balancing national interest against local need" (R. 208).

Specification of Errors

As stated *supra*, page 6, the basic issue is whether the Commerce Clause, of its own force, precludes state regulation of rates and service with respect to the direct sale and delivery, within the state attempting such regulation, to large industrial consumers, under individual contracts, of natural gas transmitted from other states by interstate pipe lines without interruption. The basic error

of the Supreme Court of Indiana is the sustaining of state regulatory authority and denial of protection of the Commerce Clause. This is specifically presented by Specifications 1, 3, 4, 5 and 25 of the Assignment of Errors (R. 222 to 227).

Other specifications of the Assignment deal with erroneous statements of law and erroneous application of legal principles made by the court below in arriving at the end result sustaining state authority which will be fully developed in the argument which follows. For a detailed itemization of such errors this Court is respectfully referred to the Assignment of Errors (R. 222-227).

Summary of Argument

1. In the last analysis the question presented is whether state regulation of the character involved in this case, is permissible, in the absence of federal regulation, under the principles stated by this Court in *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23, 64 L. Ed. 434; *East Ohio Gas Co. v. Tax Commission* (1931), 283 U. S. 465, 75 L. Ed. 1171, and other decisions of similar import, or is precluded by the Commerce Clause of its own force under the principles stated in *Missouri ex rel. Barron v. Kansas Natural Gas Co.* (1924), 265 U. S. 298, 68 L. Ed. 1027; *Public Utilities Commission v. Attleboro Steam & Electric Co.* (1927), 273 U. S. 83, 71 L. Ed. 549, and other decisions of similar import. The controlling principles are settled by the decisions of this Court but the final determination of which of such principles apply has not been made. Cf. *Arkansas-Louisiana Gas Co. v. Department of Public Utilities* (1938), 304 U. S. 61, 82 L. Ed. 1149.

2. Natural gas is a lawful article of commerce and its transmission from one state to another for sale and con-

sumption in the latter is interstate commerce. A state law whether of the state where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of, and a prohibited interference with, interstate commerce. The legal and constitutional principles applicable to natural gas are not different from those applicable to other natural products. *Pennsylvania v. West Virginia* (1923), 262 U. S. 553, 596.

3. This Court has declared that the local distribution of natural gas to the public generally is local business while its transportation in interstate commerce and sale to distributing companies is not only an indivisible transaction in interstate commerce but of primary national concern which has never been subject to state regulation. Sales to industrial consumers resemble sales in local distribution only in that both sales are to ultimate consumers. In all other respects direct sales differ from sales in local distribution as widely as do sales for resale. They resemble sales to distributing companies in every respect except the anticipated use of the product by the buyer.

Sales to industrial consumers and distributing companies are made from the same source of supply under individual contracts. The product is intended to be, and is, under the same continuous movement to the point where the buyer takes delivery in one case as in the other. Delivery is made in the same manner. Both are in wholesale quantities (the amount sold to Anchor-Hocking is ten times the amount sold and delivered through the same lateral to the Indiana-Ohio Public Service Company for resale) and industrial consumer sales are as clearly "wholesale", as the term is defined in general usage (Cf. *Roland Electric Company v. Walling* (1946), 326 U. S. 657), as sales to distributing companies. If industrial consumer sales are to be classified as local and of primary state concern, it can be only on the ground that, regardless

of all other considerations, the use to which the purchaser intends to put the commodity sold and transported in interstate commerce determines whether such sale is entitled to the protection of the Commerce Clause. If such a constitutional principle exists this Court has not yet stated it. Cf. *Schollenberger v. Pennsylvania* (1898), 171 U. S. 1, 24; *Hooven & Allison Co. v. Evatt* (1945), 324 U. S. 652, 667.

4. The basic distinction to be derived from the decisions of this Court (*Public Utilities Commission v. Landon* (1919), 249 U. S. 236; *Pennsylvania Gas Co. v. Public Service Comm.* (1920), 252 U. S. 23; *Missouri ex rel., Barrett v. Kansas Natural Gas Co.* (1924), 265 U. S. 298; *Public Utilities Comm. v. Attleboro Steam & Electric Co.* (1927), 273 U. S. 83), is between local retail distribution of the same general character as the service performed by a local distributing company and direct sale and delivery under individual contracts in wholesale quantities. The controlling consideration is the nature of the activity of the seller rather than the use to which the commodity is to be put by the buyer. The application of this principle to the sale and delivery of natural gas is in harmony with the principles long recognized and applied by this Court to the sale and delivery of other commodities in interstate commerce. A sound analogy is that of the warehouseman who imports commodities in interstate commerce for sale. Where the commodity is imported for, and delivered to, a particular customer under contract, the transaction is interstate and national in character throughout. When the commodity is to be held for sale on demand, the commerce in its national aspect ends at the warehouse, and subsequent transactions are local. Whether in either case the commodities are sold for resale or consumption is immaterial. Cf. *Walling v. Jacksonville Paper Co.* (1943), 317 U. S. 564, 87 L. Ed. 460. There is no magic in the use of the word "local" in describing the customer. All

customers are of necessity "local" whether they are industrial plants or distributing companies.

5. No valid distinction between natural gas and other commodities can be based on the contention that natural gas is affected with a public interest and consequently subject to governmental price control. Other commodities have been held subject to price regulation by both State and Federal governments. Cf. *U. S. v. Rock Royal Co-operative* (1939), 307 U. S. 533, 570, 571. Any distinction on the ground stated would open the door to state regulation of the movement as well as the price of all commodities transported and sold for consumption in interstate commerce. Such a principle would be destructive of that "area of trade free from interference by the States" created by the Commerce Clause of its own force. *Freeman v. Hewit*, (1946), 329 U. S. 249, 252.

6. The business sought to be regulated is clearly interstate commerce ending where the parties, under their individual contracts, intend the interstate movement to end, in the pipes of the consumer: (Cf. *Walling v. Jacksonville Paper Co.* (1943), 317 U. S. 564, 569; *Binderup v. Pathe Exchange* (1923), 263 U. S. 291, 309. Reduction of pressure at the time of delivery must be regarded as a mere incident in the commerce rather than its termination. (Cf. *Interstate Gas Co. v. Federal Power Comm.* (June 16, 1947), 91 L. Ed. (Adv. Op.) 1355, 1359; *Illinois Natural Gas Co. v. Cent. Ill. Pub. Serv. Co.* (1942), 284 U. S. 498, 504, 505; *State Tax Comm. v. Interstate Natural Gas Co.* (1931), 284 U. S. 41, 44.)

7. The orders of the Commission as construed and sanctioned by the Supreme Court of Indiana will both impede substantially the free flow of commerce from state to state and regulate phases of the national commerce which, because of the need of uniformity, demand that their regu-

lation, if any, be prescribed by a single authority. (Cf. *South. Pac. R. Co. v. Arizona* (1945), 325 U. S. 761, 767; *Morgan v. Virginia* (1946), 328 U. S. 373, 379; *Freeman v. Hewit*, 329 U. S. 249, 252.) The business is of paramount national concern for precisely the same reasons as the business of selling for resale. Regulation of price is not a regulation of a local aspect of the business but places a direct burden on interstate commerce inconsistent with that freedom of interstate trade which it was the purpose of the Commerce Clause to secure and preserve. *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. at p. 308; *Public Utilities Comm. v. Attleboro Steam & Electric Co.* (273 U. S. at p. 89). Such regulation is no less a burden when the sale is for consumption rather than resale.

8. The principle stated by this Court in *Freeman v. Hewit* (1946), 329 U. S. 249, 252, that attempts at state taxation have been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce, has no application to aspects of the character involved here. Regulation of a selling price is a regulation of the free flow of commerce itself and as dominant a power over commerce as the power to tax.

9. The necessity of uniformity of regulation if regulation is to be imposed is the same in the case of direct sales as sales for resale. Equality of opportunity and treatment among the various states is equally important in both. (Cf. *Missouri, ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298 at 309, 310: "Such uniformity even though it be the uniformity of governmental non-action may be highly necessary to preserve equality of opportunity and treatment among the various communities and states concerned.") What one state may do may be done by others. There can be no assurance of uniformity

of treatment by the different States. The power to regulate service is necessary to effective price regulation and is authorized by the orders involved here. This would include the power of curtailment and interruption of service which can only be done with reference to the pipeline as a whole (Testimony of O. W. Morton, R. 174, 175) and endless confusion and conflict would arise between different states demanding gas. (Cf. Report No. 800, 80th Cong., 1st Session, submitted July 7, 1947 by the Committee of the House of Representatives on Interstate and Foreign Commerce with reference to amending the Natural Gas Act at p. 10.)

10. Local interest in the protection of local utilities or their customers from competition by interstate pipeline companies; or protection of local consumers of such local utilities from higher rates which might result from such competition does not warrant state regulation of the national commerce. (*Public Utilities Comm. v. Attleboro Steam & Electric Co.* (1927), 273 U. S. 83; *Baldwin v. Seelig* (1935), 294 U. S. 511; Cf. *Buck v. Kuykendall* (1925), 267 U. S. 307; *Bush & Sons Co. v. Maloy* (1925), 267 U. S. 317.) If there be need for regulating the commerce involved, the regulation should be sought from the body in whom the power resides. *Pennsylvania v. West Virginia*, 262 U. S. 553, 600; *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298, 307; *Public Utilities Comm. v. Attleboro Steam & Electric Co.* (1927), 273 U. S. 83, 90.

11. The Natural Gas Act does not purport to give to the States any regulatory authority not previously possessed. Even if Congress there entertained the view that direct sales were subject to state regulation such a view unexpressed in legislation could not of itself redefine the distribution of power over interstate commerce, so as to with-

draw the bar of the Commerce Clause. But there is no conclusive evidence that Congress at the time of enacting the Natural Gas Act entertained such a view and there is abundant indication that the Supreme Court of Indiana is in error in its inference with respect to the opinion and intention of Congress. Report No. 800, 80th Cong., 1st Sess. (p. 10), submitted July 7, 1947 by the Committee on Interstate and Foreign Commerce of the House of Representatives on amending the Natural Gas Act. The Committee Report rejected amendments which would have given legislative expression to the conclusion of the Supreme Court of Indiana in this case. (Report of the Hearing before the Committee on Interstate and Foreign Commerce, 80th Cong., 1st Sess., on H. R. 2185, etc., April 14th *et seq.*, at pp. 634 to 660.) The view stated in the committee report was that "The pipe line does not occupy a utility status with reference to direct sales . . . Competition is the proper arbiter of prices in such direct sales. . . . Your committee feels that to alter the present situation would present a chaotic situation. If the States were given jurisdiction over direct sales by a pipe line traversing several States, it would be under a dual system of control by the Federal Power Commission and the States. There is no assurance of uniformity of treatment by the different states. . . . Curtailment and interruption of service concerns more than one State and endless confusion and conflict would arise between different states demanding gas as between States and the pipe lines."

12. The case is of great importance. The principles which this Court lays down in this case are certain to have a far-reaching effect not only on the natural gas industry but on many other phases of the protection of the Commerce Clause against state regulation or prohibition of the sale of other fuels and commodities in interstate commerce.

Argument

The scope of permissible state regulation and control of the interstate transportation and sale of natural gas as limited by the Commerce Clause has given rise to many important decisions of this Court. The general principles which must control the disposition of the question in this case are settled by those decisions and are not in dispute. The final determination of which of such principles apply, however, has not been made. In the last analysis the question is whether state regulation of the character involved here is permissible under the principles stated in *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23, 64 L. Ed. 434; *East Ohio Gas Co. v. Tax Commission* (1931), 283 U. S. 465, 75 L. Ed. 1171 and other decisions of similar import, or is precluded by the Commerce Clause of its own force under the principles stated in *Missouri ex rel. Barrett v. Kansas Natural Gas Co.* (1924), 265 U. S. 298, 68 L. Ed. 1027; *Public Utilities Commission v. Attleboro Steam & Electric Co.* (1927), 273 U. S. 83, 71 L. Ed. 549 and other decisions of this Court. In view of the contentions of the appellees and their acceptance by the Supreme Court of Indiana it is necessary to consider (1) the general principles applicable under the decisions of this Court prior to the enactment of the Natural Gas Act and (2) the effect, if any, of such enactment.

Summary of Pertinent Decisions

In the early years, because the supply in certain states was known to be limited and because there was thought to be a much smaller total supply in the United States than is today considered to exist, the primary problem with reference to state control and the Commerce Clause arose from efforts of the producing states to retain this natural

resource for their own citizens and to prevent its exhaustion by transportation to other states for sale and consumption. These efforts gave rise to *West v. Kansas Natural Gas Co.* (1911), 221 U. S. 229, and *Pennsylvania v. West Virginia* (1923), 262 U. S. 553. In the former case the attempt took the form of outright prohibition of transportation out of the state. In the latter it took the more subtle form of requiring the needs of local consumers to be met before gas could be furnished to the citizens of other states. Both efforts were held to violate the Commerce Clause.

*Certain basic principles bearing directly on the question presented here were stated in *Pennsylvania v. West Virginia*, as follows:

"Natural gas is a lawful article of commerce and its transmission from one state to another for sale and consumption in the latter is interstate commerce. A state law, whether of the state where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce—a prohibited interference" (p. 596).

It was also said that:

"The question is an important one; for what one state may do others may; and there are ten States from which natural gas is exported for consumption in other States. Besides what may be done with one natural product may be done with others, and there are several states in which the earth yields products of great value which are carried into other states and there used" (p. 596).

The process of carving out the limits of permissible regulation of sales of natural gas, transported interstate, by states in which the gas is sold commenced in *Public Utilities Commission v. London* (1919), 249 U. S. 236. It

was there held that since the interstate transportation of gas through pipelines is interstate commerce, such commerce includes the right to sell and deliver to local distributing companies free from unreasonable interference by the state, but that when the gas enters the mains of a local distributing company, the interstate movement ends and regulation of subsequent sales and deliveries belongs to the states.

One year later in *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23, this Court was required to decide whether the foregoing principle applied if the same company operated both the local distribution system and the interstate pipe line, and held that, although the entire operation constituted interstate commerce, the state could, nevertheless, in the absence of federal regulation, fix the rate at which gas was sold to local consumers. The applicability of that decision to this case is as hereinbefore stated highly important, and will be the subject of detailed consideration hereinafter. At this point in the discussion, however, it should be noted that the *Pennsylvania Gas* case neither involved nor considered the problem of direct sales in wholesale quantities to industrial consumers, under individual contracts, but dealt only with local distribution by the interstate pipe line company of the same character as that made by local distributing companies in the *Landon* case.

In 1924 the question arose whether under the doctrine of the *Landon* and *Pennsylvania Gas* cases the states, in the absence of federal regulation, could regulate the rates at which sales by interstate pipe line companies were made to local distributing companies. In *Missouri ex rel. Barrett v. Kansas Natural Gas Co.* (1924), 265 U. S. 298, it was held that the Commerce Clause of its own force precluded state regulation. This Court said that:

"The transportation, sale and delivery constitute an unbroken chain, fundamentally interstate from be-

ginning to end, and of such continuity as to amount to an established course of business, * * * (p. 309).

and that:

"* * * enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve" (p. 308).

With reference to the *Pennsylvania Gas* case it was said that:

"The business of supplying on demand local consumers, is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies" (p. 309).

In 1931 this Court had before it in *East Ohio Gas Co. v. Tar Commission*, 283 U. S. 465, the related problem of the right of the states to tax gross receipts from sales to consumers in municipalities by a company that transmitted the gas interstate just as did *Pennsylvania Gas Company*. The holding was that:

"The furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the state" (p. 471).

In so holding the Court noted the inconsistency between the *Pennsylvania Gas* case and its language quoted, *supra*, in *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, and

said: "It does not appear that there were presented in *Pennsylvania Gas Co. v. Public Service Commission* to the state court above the considerations on which it is held that interstate commerce ends and intra-state commerce begins when gas flowing through pipe lines from outside the state passes into local distribution systems for delivery to consumers in the municipalities served. But however that may be, the opinion in that case must be disapproved to the extent that it is in conflict with our decision here" (p: 472).

Whether the result in the *Pennsylvania Gas* case is finally considered to rest on the view that the business involved is local in character notwithstanding it is interstate commerce, or that interstate commerce is not involved at all, is not entirely clear from later decisions of the Court. *Illinois Nat. Gas Co. v. Cent. Ill. Public Service Co.* (1942), 314 U. S. 498, 504, 505; *Memphis Natural Gas Co. v. Beeler* (1942), 315 U. S. 649, 653. In either event, appellant does not question the result reached in those cases. The vital question is whether the principle there stated applies to that portion of appellant's business which the State of Indiana seeks to regulate.

That question was first presented to any court in *Sioux City v. Missouri Valley Pipeline Co.* (N. D. Ia. 1931), 46 F. (2d) 819, in which it was sought to enjoin a pipe line company from transporting natural gas from Nebraska into Iowa to supply two large packing plants in Sioux City. The contentions of the parties are stated in the opinion as follows:

"... the city contends that the sale of natural gas to any consumer within the city limits is subject to municipal regulation under the laws of the State of Iowa and requires a franchise from the city. On the contrary, the pipe line company contends that its

transportation from the state of Nebraska through its proposed pipe line to the plants of Armour & Company and the Cudahy Packing Company, and the sale of such gas to said companies is a single and indivisible act of interstate commerce, and that to require the pipe line company to take a franchise and submit to municipal regulation would be a direct burden on interstate commerce" (p. 822).

The court held:

1. That the transaction was clearly interstate commerce and not subject to local regulation.
2. That the *Landon* and *Pennsylvania Gas* cases did not apply because:
 - (a) In those cases the pipe line companies had undertaken to furnish public gas service to the citizens generally of municipalities. They were not performing particular contracts but were holding themselves out to serve all applicants. The service was general and of a common character meeting the demand of domestic use and local consumers of other classes.
 - (b) Service to the packing companies was not comparable to a general service to all the inhabitants of a city because the packing companies required a supply wholly beyond comparison with ordinary consumers and no general rule applicable to the public would meet their requirements or necessities.

In 1933 the Public Utilities Commission of Colorado determined that it had no jurisdiction to regulate the direct sales to industrial consumers of Colorado Interstate Gas Co. (*Re Colorado Interstate Gas Company*, P. U. R. 1933 E 349). The Commission was unable to see any reason

for applying a different principle to sales to industrial consumers from that applied by this Court in the *Barrett* case to sales to local distributing companies for resale. The *Pennsylvania Gas Company* and *East Ohio Gas Company* cases were distinguished on the ground that they involved the business of supplying gas generally to the inhabitants of municipalities rather than direct deliveries to specific consumers under contract. The argument was made that the direct sales should be regarded as local because pressure was reduced at the point of delivery but the Colorado Commission noted that this differed in no respect from the reduction of pressure made to deliver to companies engaged in local distribution and pointed out that this Court had already held in *State Tax Comm. v. Interstate Natural Gas Co.* (1931), 284 U. S. 41, that such reduction was a mere incident of delivery which does not deprive sales to distributing companies of their interstate character. The Commission saw no reason for a distinction in this respect based solely on whether the sales were made for consumption or resale.

In *State ex rel. Cities Service Company v. Public Service Commission* (1935), 337 Mo. 809, 85 S. W. (2d) 890, the Supreme Court of Missouri held that the Missouri Public Service Commission had no jurisdiction over the business of an interstate pipe line company serving twelve industrial consumers in the state. It held that there was no essential difference between selling, transporting, and delivering to an industrial consumer under contract and selling and delivering in the same manner to a local distributing company, and that the applicable principles were those stated and applied by this Court in the *Barrett* case rather than in the *Pennsylvania Gas* case. This Court denied certiorari (296 U. S. 657).

In 1937 this Court decided *Southern Nat. Gas Corp. v. Alabama*, 301 U. S. 148. In that case a pipe line company maintained its office and principal place of business in

Birmingham, Alabama, where the entire management and control of the business were lodged. It had contracts in Alabama for the delivery of gas to three distributing companies and to an industrial consumer which purchased for itself and a number of separate plants operated by affiliated companies. Sales to the industrial consumers were made from time to time on orders given by the Birmingham office as the needs of the purchasers required. Although recognizing that the facts of the two cases were not the same, this Court said that there was an analogy to the situation in the *East Ohio Gas* case and distinguished *State Tax Comm. v. Interstate Nat. Gas Co.* (1931), 284 U. S. 41, 76 L. Ed. 156 (denying that reduction of pressure alone terminated interstate movement) saying that:

"There were no such local activities as are present here to carry the transactions of the company into the field of state authority" (p. 156).

Whatever the local activity there referred to, it is indisputable on the record in this case that there is no element of local activity in connection with the sales to Anchor-Hocking and DuPont not equally present in appellant's sales to local distributing companies. The Supreme Court of Indiana so recognized saying:

"Such sales and deliveries are, so far as segregation and reduced pressures are concerned, almost exactly like sales direct to large industrial consumers. For example, gas for Anchor-Hocking and gas for the Indiana-Ohio Company, the distributing utility serving the City of Winchester, and other towns thereabout, leave the main line through the same lateral, and at identical pressures. In fact they are inseparably a part of the same flow. This common flow continues until the lateral divides close to points of delivery to Anchor-Hocking and the Indiana-Ohio

Company. As has already been shown, the pressures there, while not exactly the same to each, are substantially the same. If the segregation and reduced pressure for delivery to the Indiana-Ohio Company do not make such transactions intrastate commerce under the 'broken package' theory, we cannot very consistently apply the 'broken package' theory to almost identical deliveries to Anchor-Hocking" (R. 201).

Any distinction between the two types of sales must be sought solely in the disposition the buyer intends to make of the commodity purchased. As hereinafter more fully discussed no such distinction has been recognized by this Court with reference to the sale and delivery in interstate commerce of commodities other than natural gas and no sound principle of law supports such a distinction.

In *Illinois Natural Gas Co. v. Central Illinois Public Service Co.* (1942), 314 U. S. 498, 506, 86 L. Ed. 371, 376 this Court said:

"In *Southern Natural Gas Corporation v. Alabama* (1937), 301 U. S. 148, 156, 167, 81 L. Ed. 970, 976, 57 S. Ct. 699, on which the Illinois Supreme Court relied, we held only that the sale of gas to a local industrial consumer by one who was piping the gas into the state was a local business sufficient to sustain a franchise tax on the privilege of doing business within the state measured by all of the taxpayers' property located there, including that used for wholesale distribution to local public service companies."

The last decision of this Court bearing on any phase of the problem presented, prior to the enactment in 1938 of the Natural Gas Act, was *Arkansas-Louisiana Gas Co. v. Department of Public Utilities* (1938), 304 U. S. 61, 82 L. Ed. 1149. In that case the pipe line company not only sold to distributing companies for resale, and to industrial consumers direct, as does the appellant in *Indiana*, but also

sold to local consumers through the operation of local distributing systems in various Arkansas towns. It was thus admittedly a public utility subject to the regulatory jurisdiction of the state commission regardless of whether its direct sales were so subject. The Arkansas Commission ordered the pipe line company to file copies of its contracts, rates and regulations for sales to its industrial consumers. In holding that the order required only the furnishing of information which would not unduly burden interstate commerce, this Court pointed out that since the pipeline company was operating locally it might be highly important for the state authorities to have information concerning all of its operations. It further said, however:

"In case the Department undertakes by some future action to impose what may be deemed unreasonable restraint or burden upon appellant's interstate business through rate regulation or otherwise that may be contested" (pp. 63, 64).

Appellees have contended that by the foregoing language this Court meant to say only that the pipe line company would be entitled to future protection from *unreasonable* rate regulation. But the protection referred to was in connection with the Commerce Clause and not the 14th Amendment. In any event that case clearly left open for future determination the question presented here. As heretofore pointed out (ante, p. 13) the Commission in this case refused to accept filing of matters specified in its order as information only, and the Supreme Court of Indiana specifically construed its action as presenting for decision the issue of regulatory jurisdiction under principles announced by this Court in *Public Utilities Commission v. United Fuel Gas Company* (1943), 317 U. S. 456; 87 L. Ed. 396 (R. 199, 200).

Shortly after the *Arkansas-Louisiana Gas Co.* decision, the Federal Natural Gas Act (15 U. S. C. A., Sec. 717) was enacted, by which the Federal Power Commission was

given jurisdiction of the interstate transportation of natural gas and of interstate sales for resale. Appellant's position as to that Act, more fully developed hereinafter, is that it added nothing to state regulatory authority but did express the policy of Congress that interstate sales of natural gas by natural-gas companies directly to large industries should not be subjected to regulation.

Since the Arkansas-Louisiana decision, this Court has had no opportunity to consider the issue in this case, although sales to industrial consumers were indirectly involved in *Colorado Interstate Gas Co. v. Federal Power Commission* (1945), 324 U. S. 581, 89 L. Ed. 1206, and *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (1945), 324 U. S. 635, 89 L. Ed. 1241. Primarily these cases involved rates for sales for resale, and sales to industrial consumers were involved only because of the question of allocating to those sales some portion of the value of the property used for both types of sales. The *Colorado Interstate* case also involved the question of whether sales for resale to industrial consumers were sales for "ultimate distribution to the public" within the meaning of the Natural Gas Act. In the latter case the Court referred to intrastate sales, interstate transportation and sales to industrial consumers, and interstate transportation to distributing companies for resale, as constituting three separate phases of the business and in the *Panhandle Eastern* case referred to the direct sales as "unregulated business . . . at prices fixed in competition with other fuels." No issue of state regulatory authority was involved.

In 1940, after the enactment of the Natural Gas Act, a three-judge federal district court, as noted by this Court in *Interstate Natural Gas Co. v. Federal Power Commission*, (June 16, 1947), 91 L. Ed. (Adv. op.) 1355, 1358, enjoined the Louisiana Public Service Commission from asserting jurisdiction over the business of a pipeline company which sold gas transported from outside the state to in-

dustrial consumers as well as distributing companies, on the ground that the business was interstate commerce. *Interstate Nat. Gas Co. v. La. Pub. Serv. Comm.* (E. D. La. 1940), 34 F. Supp. 980.

In 1945 the Sixth Circuit Court of Appeals had occasion to refer to the question in *Columbia Gas & Electric Corporation v. U. S.*, 151 F. (2d) 461, 463-464, 468. In contrasting the operation of *Columbia* and its subsidiaries, with that of *American Fuel* and its subsidiaries, the court noted that the former served both domestic and industrial consumers and thus were public utilities subject to the rules and regulations of state public utility commissions, whereas the latter served only industrial users under private agreements, and were, thus, immune from municipal and state regulation. It was further noted that, as a result, *American Fuel* had a substantial competitive advantage over *Columbia* which had enabled it to take from the subsidiaries of the latter some of their large industrial customers.

It is apparent from the record in this case and the opinion of the Supreme Court of Indiana that the primary result sought here is a method of curtailing appellant's industrial consumer business rather than the protection of its customers against unreasonable rates or inadequate service. No industrial consumer has sought to intervene to complain about either. In determining that local interest outweighs national interest and justifies state regulation of interstate sales to industrial consumers, the court below specifically stated that, if the state is unable to regulate the direct sales of interstate pipe lines, the result will be to give both the pipe line companies and their customers competitive advantages over regulated local utilities and their customers which will result in higher rates to all customers of the local utilities. As will be more fully developed hereinafter, appellant insists that any consideration of local interest of this character as a basis for

sustaining local regulation of interstate commerce is directly at variance with principles long stated and followed by this Court.

II

Principles to be Applied

Among the principles derived from the foregoing decisions of this Court which must be applied here are the following:

1. Natural gas is a commodity and a lawful article of commerce. In determining the application of the Commerce Clause, and the limits of state and national jurisdiction, the principles applied are precisely the same as those which have long been established in other fields of interstate commerce with reference to other commodities. There is nowhere in the decisions of this Court any support for the view that ordinarily accepted legal and constitutional principles are to be discarded when the commodity dealt with is natural gas.

2. The local distribution of natural gas to the public generally is local business subject to state regulation even though the gas has been transported in interstate commerce and regardless of whether the local distributor is an independent company or the company that also transports the gas.

3. The transportation of gas in interstate commerce and its sale to distributing companies is not only an indivisible transaction in interstate commerce but of primary national concern and the states have at no time possessed authority to regulate rates for such sales or otherwise to interfere with, or to obstruct, the commerce.

In determining the principle applicable here, it is necessary to examine the likenesses of, and the differences be-

tween, sales of the character involved here, sales of the character generally described as local distribution, and sales to distributing companies for resale. On the record in this case, it is clear that sales to industrial consumers resemble the sales generally described as local distribution only in that both are to the ultimate consumer. In all other respects they differ from such sales as widely as do sales to distributing companies. On the other hand, they differ from the latter only with reference to the anticipated use of the product by the buyer.

Sales to industrial consumers and to distributing companies are made from the same source of supply under individual contracts. The product is intended to be, and is, under the identical continuous movement in one case as in the other. The transportation is as interstate with reference to one as the other. Both are in wholesale quantities. The volume sold and delivered to Anchor-Hocking is ten times the quantity sold to Indiana-Ohio Public Service Company for distribution to local consumers (Stip. R. 35, 36). Industrial consumer sales are as clearly "wholesale", as the term is defined in general usage (*Roland Electric Company v. Walling* (1946), 326 U. S. 657, 673, 90 L. Ed. 383, 392) as the sales to distributing companies.

The sale to Indiana-Ohio Public Service Company through the Winchester lateral, is indisputably an interstate sale of paramount national rather than local concern, which the State of Indiana has always been barred from regulating for the reason that uniform regulation from a single source is required if any governmental regulation is to be imposed (*Missouri ex rel Barrett v. Kansas Natural Gas Co.*, *supra*). If the sale and delivery to Anchor-Hocking in substantially the identical manner is to be classified as one of primary local concern to the State of Indiana, it can be only on the ground that, regardless of all other considerations, the use to which the purchaser intends to

put a commodity sold and transported in interstate commerce determines whether such sale is entitled to the protection of the Commerce Clause.

If such a constitutional principle exists, this Court has not yet stated it. In *Schollenberger v. Pennsylvania* (1898), 171 U. S. 1, it was contended that, although wholesale sales of oleomargarine in interstate commerce were protected from state interference, sales to consumers were not so protected. This Court said (p. 24):—

“We are not aware of any such distinction as is attempted to be drawn by the court below in these cases between a sale at wholesale to individuals engaged in the wholesale trade, or one at retail to a consumer.”

In *Hooven & Allison Co. v. Evatt* (1945), 324 U. S. 652 involving the right of a state to impose a property tax on materials imported for manufacture, it was said (p. 667):

“We do not perceive upon what grounds it can be thought that imports for manufacture lose their character as imports any sooner or more readily than imports for sale.”

The decision by the Supreme Court of Indiana in this case (aside from its view as to the effect of the Natural Gas Act) is based principally on its conclusion that “the result in the *Pennsylvania Gas Co.*, case was predicated largely upon the fact that the sales involved were to consumers” (R. 209). In this connection the court below quoted the following language from *Missouri ex rel., Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298, 309:

“In both cases the things done were local, and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized

in the *Landon* Case. The business of supplying, or demand, ~~local~~ consumers, is a local business, even though the gas be brought from another state, and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance"

Comparing the *Landon* case and the *Pennsylvania Gas Co.* case, the court below said (R. 209):

"By this language the Supreme Court of the United States seems to us to indicate that the test is whether or not local business is involved and that supplying local consumers is a local business. . . . In the case before us the sales are and will be to local customers for their own consumption. Therefore, paraphrasing the language quoted, the local interest is paramount and interference with interstate commerce, if any, is of minor importance and permissible."

It is only necessary to consider the language quoted from the *Barrett* case to demonstrate the fallacy of the conclusion. What things done by the appellant in this case are local and done after the business in its essentially national aspect have come to an end? What appellant does in delivering to Anchor-Hocking is precisely what it does in delivering to Indiana-Ohio Public Service Company. The business in its essentially national aspect comes to an end at precisely the same point in each case and appellant does nothing thereafter. It is perfectly clear that this is not the kind of business that this Court was characterizing as local business in the *Barrett* case. Immediately before language quoted by the court below, this Court

said in the *Barrett* case, with reference to the *Pennsylvania Gas Co.* case:

"The commodity after reaching the point of distribution in New York was subdivided and sold at retail. The Landon case, so far as this phase is concerned, differs only in the fact that the process of division and sale to consumers was carried on not by the Supply Company, but by independent distributing companies."

The business characterized as local in the *Barrett* case was not the mere sale for consumption but "the process of division and sale" and the "business of supplying on demand". In this case no process of division and sale to consumers is carried on and appellant is not in the business of supplying local consumers on demand. In *Public Utilities Commission v. Attleboro Steam & Electric Co.*, (1927), 273 U. S. 83, 71 L. Ed. 549, the controlling question was stated to be whether the rule of the *Pennsylvania Gas Co.*, case or that of the *Barrett* case applied to the right of the Rhode-Island Commission to regulate the rate at which a utility of that state furnished electricity to a Massachusetts distributing company under contract. In distinguishing the *Pennsylvania Gas Co.* case, this Court pointed out that, in that case, the gas was brought from Pennsylvania to a distribution point in a city in New York where it was subdivided and sold to local consumers at retail in substantially the same manner as the service would have been rendered by a local plant furnishing gas to consumers in a city. No implication can be gathered from the language used in the *Attleboro* case that the distinction turned solely on the question of whether the purchasers were consumers or retailers.

This Court also said in the *Barrett* case (pp. 309, 310):

"The transportation, sale, and delivery constitutes an unbroken chain, fundamentally interstate from

beginning to end, and of such continuity as to amount to an established course of business. The paramount interest is not local but national—admitting of and requiring uniformity of regulation.

The transportation, sale and delivery to appellant's industrial consumers equally constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. The proper distinction to be derived from the *Barrett* and *Attleboro* cases is between local distribution to consumers and direct sale and delivery under contract, whether for consumption or resale. The controlling consideration indicated is the character of the activity of the seller rather than the use to which the commodity is to be put by the buyer. The application of this principle to the sale and delivery of natural gas is in harmony with the principles long recognized by this Court with reference to the sale and delivery of other commodities in interstate commerce, whereas the conclusion imputed to this Court by the court below is entirely inconsistent with such principles as well as with the language of this Court upon which it relies.

A sound analogy is that of the warehouseman who imports commodities in interstate commerce for sale. This Court held in *Walling v. Jacksonville Paper Co.* (1943), 317 U. S. 564, 87 L. Ed. 460 that, where the commodity is imported for and delivered to a particular customer under contract, the transaction continues to be interstate throughout. Conversely, when the commodity is to be held for sale on demand, the commerce in its national aspect ends at the warehouse, and subsequent transactions are local. In neither case does the question of whether the sale is local or national turn on whether the purchaser of the goods from the warehouse intends to resell or consume them. There is no magic in the use of the word "local" in describing the customer. All customers are of neces-

sity local whether they are industrial plants or distributing companies.

The appellees may contend in this Court, as they have in the lower courts, that the principles applicable to the sale and delivery of other commodities are not applicable to natural gas because it is affected with a public interest and therefore amenable to governmental price regulation. Granting that this is so, other commodities have been held subject to price regulation both by state and federal governments (Cf. *U. S. v. Rock Royal Cooperative* (1939), 307 U. S. 533, 570, 571). If, therefore, a distinction is predicated on that ground, the door is opened for price regulation of all such commodities by the states in which they are sold after being transported from other states, regardless of the Commerce Clause, provided only that they are sold for consumption rather than resale. The sanction of such a principle would clearly be destructive of that "area of trade free from interference by the States created by the Commerce Clause of its own force." *Freeman v. Hewit* (1946), 329 U. S. 249, 252.

The result reached in the Supreme Court of Indiana cannot be sustained on the bare ground, there asserted, that all sales for consumption are *ipso facto* local and therefore subject to state regulation. There is no sound basis for the application to natural gas of a principle different from that applied to the sale and delivery of other commodities in interstate commerce.

III

The Business Sought to be Regulated is Interstate Commerce

The Supreme Court of Indiana substantially conceded that the business here sought to be regulated is interstate commerce but decided that it was, nevertheless, of paramount local interest and consequently subject to state

regulation regardless of its interstate character. Its concession of the interstate character of the sales was compelled by the recognition that there is no logical basis for holding that, although appellant's sales and deliveries to Indiana-Ohio Public Service Company and other local distributing companies served by its laterals are admittedly interstate commerce, its substantially identical sales and deliveries to Anchor-Hocking and DuPont are intrastate. The appellees, however, may continue to contend the contrary. The only argument which has ever been advanced in support of the claim that sales to industrial consumers constitute intrastate commerce is based on the reduction of pressure at the time of delivery, but there is no legal or logical basis for the contention that such reduction terminates the interstate movement only if the purchase is for consumption but not if it is for resale. In *Interstate Natural Gas Co. v. Federal Power Comm.* (June 16, 1947) 91 L. Ed. (Adv. op.) 1355, 1359, this Court rejected the contention that the interstate movement should be regarded as beginning when the gas, theretofore moving through the line at well-pressure, was subjected to increased pressure in the compressor stations of the purchasing companies in order that it might be moved to distant markets, saying that the increase of pressure in the compressor stations must be regarded as merely an incident in the interstate commerce rather than as its origin. By parity of reasoning the reduction of pressure at the meter-house at the time of delivery to the industrial consumers must be regarded as merely an incident in the interstate commerce rather than as its termination. This Court has so held with reference to reduction of pressure in delivering to distributing companies for resale. *State Tax Comm. v. Interstate Natural Gas Company*, 284 U. S. 41, 44, or to another pipeline company for delivery to distributing companies, *Illinois Natural Gas Co. v. Cent. Illinois Pub. Service Co.*, 314 U. S. 498, 504, 505. If, as stated in *Colorado*

Wyoming Gas Co. v. Federal Power Comm., 324 U. S. 626, 631, "That commerce does not end until the gas enters the service pipes of the distributing company," there can be no basis for the contention that it ends in the meter-house if the purchase is for consumption. The intention of the parties as to the point where the parties originally intended that the interstate movement should terminate (*Walling v. Jacksonville Paper Co.* (1943), 317 U. S. 564, 569; *Bindérup v. Pathe Exchange* (1923), 263 U. S. 291, 309) is the same in both transactions.

IV

The Business is of Paramount National Concern and Requires Uniform Regulation by a Single Authority if Regulation is to be Imposed

In holding that, regardless of its character as interstate commerce, the business sought to be regulated is subject to state regulation on the ground that it is so local in its nature and implications that local needs outweigh national interest and that it is not of such character as to require uniform regulation on a national basis, the court below has misapplied certain principles long recognized by this Court and recently stated in *Southern Pac. R. Co. v. Arizona* (1945), 325 U. S. 761; *Morgan v. Virginia* (1946), 328 U. S. 373; and *Freeman v. Hewit* (1946) 329 U. S. 249. The principles, there stated, which the court below misapplied are that:

"When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority" (*Southern Pac. Co. v. Arizona*, 325 U. S. 761, 767).

"* * * where Congress has not acted and although the state statute affects interstate commerce, a state

may validly enact legislation which has predominantly only a local influence on the course of commerce" (Morgan v. Virginia, 328 U. S. 373, 378).

"But in the necessary accommodation between local needs and the over-riding requirement of freedom for the national commerce, the incidence of a particular type of state action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State" (Freeman v. Hewit, 329 U. S. 249, 253).

The court below did not comprehend the controlling effect here of other principles, fundamental in character, restated in those cases, namely:

"But ever since *Gibbons v. Ogden*, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." (*Southern Pac. R. Co. v. Arizona*, 325 U. S. 761, 767.)

"It is equally well settled that, even where Congress has not acted, state legislation or a final court order is invalid which materially affects interstate commerce." (Morgan v. Virginia, 328 U. S. 373, 378.)

"A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of commerce between States." (Freeman v. Hewit, 329 U. S. 249, 252.)

This Court is, of course, the final arbiter of the competing demands of state and national interest. *Southern Pac.*

Co. v. Arizona, 325 U. S. 761, 769; *Morgan v. Virginia*, 328 U. S. 373, 380. The orders of the Commission under review here, as construed and sanctioned by the Supreme Court of Indiana, will both impede substantially the free flow of commerce from state to state and regulate phases of the national commerce which, because of the need of uniformity, demand that their regulation, if any, be prescribed by a single authority.

The position of the court below that the business is local, and consequently subject to local regulation in all phases, because the sales are to consumers has been hereinbefore considered (ante, pp. 36 to 41). This would apply to natural gas a principle not recognized as to other commodities sold and delivered in interstate commerce and unjustified by any language of this Court in the decisions relied on to support it. Unless such a distinction is valid, the business sought to be regulated is essentially national in character for the same reasons as the business of sales for resale, and the principles heretofore applied by this Court to the latter sales are controlling rather than the principles applied to local distribution in the *Pennsylvania Gas Co.* case.

Price regulation is plainly not regulation of a local aspect of interstate commerce. As stated in *Missouri ex rel. Barrett v. Kansas* (265 U. S. 298 at 308):

“But the sale and delivery here is an inseparable part of a transaction in interstate commerce,—not local but essentially national in character—and enforcement of a selling price in such a transaction places a direct burden upon such interstate commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve.”

And in *Public Utilities Commission v. Attleboro Steam & Electric Company* (273 U. S. 83 at p. 89), it was said that

the order of the state commission was "a regulation of the rates charged by the Narragansett Company for the interstate service to the Attleboro Company, which places a direct burden upon interstate commerce" and that "being the imposition of a direct burden upon interstate commerce, from which the State is restrained by the force of the Commerce Clause, it must necessarily fall, regardless of its purpose."

If the regulation of a selling price directly burdens interstate commerce where the purchase is for resale, by what legerdemain of logic does it become less of a burden when the purchase is for consumption? Could it be seriously contended that regulation by the states of the selling price of coal or oil, transported from other states, to industrial consumers under contract, would impose no burden on interstate commerce and that such interference would be "of minor importance and permissible"? Yet what objection can there be to such a result if this decision is permitted to stand? Surely, it can not be shown that the principles applicable to other commodities have no application to the interstate sale of natural gas and that what would be concededly business of national concern as to other commodities is merely local business if the commodity is natural gas.

The court below cites the statement of this Court in *Freeman v. Hewit*, 329 U. S. 249, 252, to the effect that attempts at state taxation of interstate commerce have been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce and says:

"This leniency toward the police power as compared with the taxing power of the states inures to the benefit of the appellants in the case before us, not only in considering the merits of the differences involved but in weighing the value of the decided cases as precedents" (R. 210).

But this Court obviously had reference to those local aspects of commerce with which police power has been traditionally concerned. Regulation of the selling price is a regulation of the free flow of commerce itself and the power to regulate price is just as clearly a dominant power over commerce as is the power to tax. The principle stated in the *Hewitt* case with reference to police power regulation of local aspects of commerce has no application to the regulation involved here unless the principle is adopted that all sales to consumers are local aspects of commerce.

With reference to the necessity of uniformity if price is to be regulated, this Court said in *Missouri, ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298, 309, with reference to the business of selling to local distributing companies:

"The paramount interest is not local but national, admitting of and requiring uniformity of regulation. Such uniformity, even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and States concerned."

There is no valid distinction in this respect between sales to distributing companies for resale and sales to industrial plants for consumption. Equality of opportunity and treatment among the various communities and states is equally important in both types of sales. What one state may do may be done by others and, while each state would be precluded by the 14th Amendment from imposing confiscatory rates, there would be no other limitation even tending to secure uniformity. There could be as many prices as there are states traversed by a pipeline. The question of available supply of necessity enters into price. In order to effectuate price control in any state the right to compel a supply at the price fixed is

essential. Otherwise, the supply would naturally go to states permitting better prices, or imposing no regulation. These considerations are precisely the same whether the gas is furnished for industrial consumption or resale. But the matter of compelling the furnishing of a supply is plainly one where the interest of each state would conflict. This leads to the question of the assertion in the orders involved here of jurisdiction to regulate service to industrial consumers.

The orders do not presently purport to impose regulation on appellant's service. The opinion of the court below, however, clearly indicates what may reasonably be regarded as in prospect in this respect. One admitted purpose of the regulation is to neutralize any competitive advantages appellant or its customers may have over local utilities and their customers (R. 208). The court below also refers to Indiana Acts of 1945, Ch. 53, p. 110 (R. 211) requiring a Certificate of Convenience and Necessity from the Commission in order to serve industrial consumers direct. The orders of the Commission, as heretofore stated, threaten enforcement of this statute with reference to the service to DuPont, for which appellant has a Certificate of Convenience and Necessity from the Federal Power Commission. The right of a state to require such a certificate in order to engage in interstate commerce was denied by this Court in *Buck v. Kuykendall* (1925), 267 U. S. 307, and *Bush & Sons Co. v. Maloy* (1925), 267 U. S. 317.

On the other hand, the opinion of the court below states that appellant is a public utility subject to control of the Indiana Public Service Commission under Sec. 54-105, Burns' Ind. Ann. Stat. 1933, which defines a public utility to be " * * * every corporation * * * that now or hereafter may own, operate or control any * * * plant or equipment * * * for the * * * transmission, de-

livery or furnishing of heat, light, water or power * * * either directly or indirectly to or for the public" (R. 211).

In arriving at this conclusion, the court below says that appellant is admittedly "selling gas in Indiana indirectly to and for the public through distributing companies and that makes it a public utility under the Indiana statute, subject to regulation and control by the Indiana Public Service Commission (R. 211). In view of the fact that the court below, elsewhere in its opinion, indicates a knowledge of the existence of the Natural Gas Act and the pertinent decisions of this Court both prior and subsequent to that Act,* it is difficult, if not impossible, to understand how the court below could have actually reached the conclusion that the business of selling natural gas to distributing companies, over which the state has never possessed jurisdiction, could of itself subject appellant to the regulatory jurisdiction of the Commission. This point was specifically called to the attention of the court below in appellant's petition for rehearing (Specs. 21, 22, 23, R. 218) but the petition was denied without change in the opinion (R. 220).

More important, with respect to the question presented here, however, is the conclusion of the court below that as a public utility, appellant will be obligated to serve all who apply and will not be permitted to select its customers. If this is true in Indiana, it is also true in each of the several states in which appellant operates. It is inconceivable that regulation of this character can fail to bring about not only conflicts between the states but conflicts between the states and the Federal Power Commission.

* *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298; *Peoples Natural Gas Co. v. Public Service Commission* (1926), 270 U. S. 550; *State Corp. Comm. v. Wichita Gas Co.* (1934), 290 U. S. 561, 563; *Illinois Natural Gas Co. v. Central Illinois Public Service Company* (1942), 314 U. S. 498, and *Public Utilities Commission v. United Fuel Gas Co.* (1943), 317 U. S. 456.

As shown by the record (ante, p. 14) substantially all industrial consumers' contracts are on an interruptible basis and the service is curtailed when the supply would be insufficient to supply the firm commitments of local distributing companies for domestic and commercial customers. There is uncontroverted evidence that any curtailment program must be based on the operation of the pipeline system as an entirety (R. 174, 175). Moreover the provisions of the Natural Gas Act giving the Federal Power Commission jurisdiction over the construction of facilities for the interstate transportation of natural gas make it extremely doubtful whether appellant could, if ordered to do so by a state commission, enlarge its interstate transportation facilities in order to serve new industrial customers without authorization from the Federal Power Commission. (As stated ante, p. 10, such a certificate was applied for and issued with reference to the DuPont service over the objection of the appellee Commission.)

The Federal Power Commission has also asserted the right to prevent a pipe line company from serving new customers, even though additional transportation facilities are not required if that Commission determines that such service would impair ability to render satisfactory service to existing customers. In its opinion No. 130 issued March 14, 1946, "In the matter of Panhandle Eastern Pipe Line Company and Michigan Consolidated Gas Company" in Docket No. G-688⁵ (63 P. U. R. (N. S.) 313) that Commission said (p. 220):

"Therefore, it is our view that where, as here, a company has not the capacity to sell a large quantity of gas to a new customer without impairing its ability to render satisfactory service to existing customers, it is the duty of the Commission in protecting the interest of the public to prevent such company from using the facilities subject to its jurisdiction for such purpose."

That the conflicts suggested are not purely conjectural is fully supported by Report No. 800, 80th Cong., 1st Sess., submitted July 7, 1947 by the Committee of the House of Representatives on Interstate and Foreign Commerce with reference to amending the Natural Gas Act. This report is of great importance in connection with the effect of the enactment of the Natural Gas Act on the question involved here and will be further referred to in that connection. It is also important, in connection with the question of whether uniform regulation of direct sales is necessary, if any regulation is to be imposed.

As background for an understanding of the full significance of this report, it should be noted that, as shown by the report of the "Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives (80th Cong., 1st Sess., April 14 to 18 and May 28 and 29, 1947) on H. R. 2185, H. R. 2235, H. R. 2292, H. R. 2956 at pp. 634 to 660 of said report the National Association of Railroad and Utility Commissioners proposed an amendment (p. 641) specifically described as following the language of the McCarran Act, so far as it relates to regulation, which would definitely have authorized State regulation of sales of the character involved in this case.

The Report at page 10 states:

"The bill makes no change in the present law as to direct sales by pipe lines to industrial consumers, which sales, under the Natural Gas Act, are exempt from Federal Power Commission jurisdiction. Your committee feels that no change is necessary in the public interest.

"Your committee has considered the amendment offered by the National Association of Railroad and Utility Commissioners, proposing to permit the various States to exercise jurisdiction over direct sales, and has concluded that the adoption of the amend-

ment would not be in the public interest but would be more likely to add to the existing confusion.

"The pipe line does not occupy a utility status with reference to direct sales. By the regulation of the utilities which serve him, the small consumer who goes about his day's work is protected from exorbitant rates, but direct sales are made to businesses, factories, etc. They are sales at arm's length. The purchaser is engaged in the business of securing fuel at the lowest possible price. He is his own protection. He does not need the aid of a regulating authority. Competition is the proper arbiter of prices in such direct sales. As in other businesses under our competitive system of free enterprise, this problem should be left to the businessmen themselves, to the pipe lines and their customers. They know the business and deal with each other on a fair-bargaining basis.

"Your committee feels that to alter the present situation would present a chaotic situation. If the States were given jurisdiction over direct sales by a pipe line traversing several States, it would be under a dual system of control by the Federal Power Commission and the States. There is no assurance of uniformity of treatment by the different States. The power to regulate direct sales would include the power of curtailment and interruption of service. The different States would conceivably have different views on the matter of curtailment and interruption regardless of its effect on the needs for gas in other States. Curtailment and interruption of service concerns more than one State and endless confusion and conflict would arise between different States demanding gas as between States and the pipe lines. Also it is conceivable that conflicts would arise between the Federal Power Commission jurisdiction

as against the demands of the States to regulate prices, to interrupt service and to curtail service.

"It is not necessary to exercise regulatory controls over direct sales in order to assure adequate service to the utility consumers. With the amendment made by section 6 of the bill there will be no doubt as to the power of the Commission to compel a pipeline to render good service for sales under the Commission's jurisdiction."

While the Committee report takes the view that no regulation of direct sales is required, it also supports the position, contrary to the assumption of the court below, that such sales are phases of the national commerce which because of the need of national uniformity demand that their regulation, if any, be prescribed by a single authority, and not by the several States. If so, State regulation is precluded by the Commerce Clause of its own force.

V

Local interest in the protection of local utilities or their customers from competition by interstate pipeline companies or their local consumers from higher rates as a result of such competition does not authorize local regulation

The court below held that a weighty consideration, in balancing national interest against local need, was the local interest in protecting local distributing companies from pipeline company competition for industrial consumer business in order to protect local consumers from higher rates which would be necessitated by a reduced volume of industrial consumer business for local companies, and in protecting customers of the local utilities from disadvantages which would be suffered if customers

of the pipeline companies were given more favorable rates or service. This Court has never recognized local interest of the character asserted as a basis for local regulation of interstate commerce and has several times rejected similar contentions.

In *Public Utilities Commission v. Attleboro Steam & Electric Company*, (1927), 273 U. S. 83 the local interest argument was that inability of the Rhode Island Commission to fix a higher rate for the local company's sale of power to the Massachusetts company than that fixed by contract, imposed an unreasonable rate burden on Rhode Island consumers and impaired the regulatory functions of the appellant Commission. This Court, at p. 90 said:

"Furthermore, if Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island. Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character. The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests;".

State efforts to regulate rates of sales for resale of natural gas transported in interstate commerce were sought to be predicated on local interest in regulating

rates of distributing companies which was handicapped because of the floor established by the wholesale rates. This Court said in *Missouri, ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298, 308:

"The contention that, in the public interest, the business is one requiring regulation, need not be challenged. But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation."

Protection of local concerns from competition from interstate commerce was denied as a basis for regulation in *Baldwin v. Seelig*, 294 U. S. 511, 527. This Court said:

"Neither the power to tax nor the police may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents."

And in *Freeman v. Hewitt*, 329 U. S. 249, 252 it was said that:

"These principles of limitation on state power apply to all state policy no matter what State interest gives rise to its legislation."

It is no answer to say, as does the court below (R. 208) that, unless state regulation is permissible, appellant's direct sales to industrial consumers will be unregulated. As this Court said in *Pennsylvania v. West Virginia*, 262 U. S. 553, 600:

"If there be need for regulating the interstate commerce involved, the regulation should be sought from the body in whom the power resides."

Actually, there is no discernible relation between regulation of appellant's rates and service and the protection of local utilities from competition which it is claimed would result in higher rates for local consumers. This objective can be achieved only by excluding appellant and other interstate pipeline companies from making sales direct to industrial consumers, since it cannot be assumed that regulation, if permissible under the Commerce Clause, could be made confiscatory for the purpose of discouraging continuation or expansion of the business. The real objective sought to be accomplished by the local utilities and the state commission is plainly stated in the memorandum submitted by the advisory counsel for the National Association of Railroad and Utility Commissioners in the "Hearings of the Committee on Interstate and Foreign Commerce, House of Representatives" (80th Cong., 1st Sess., April 14, 1947 *et seq.*) on H. R. 2185, H. R. 2235, H. R. 2292, H. R. 2569, and H. R. 2956, which appears in the report of those hearings at pages 640 *et seq.* At page 644 the following statement is made:

"To exempt industrial sales of interstate gas from State regulation would disorganize State regulation, and would open the local field to the unregulated raids of unlicensed interstate pipeline companies, which would skim off the cream of the business of local companies, represented by sales to large industrial users, and would leave the general rate-paying public, who must support the local companies, to absorb and bear the resulting loss of revenue from that business."

Clearly this objective presents not a local problem, but a far-reaching issue of national policy. If sound national policy requires that the States should have the right to exclude interstate pipe line companies from, or restrict them in, the field of direct sales to industrial consumers

for the protection of local utilities and their customers, Congress can say so whenever it chooses but, under constitutional principles which have stood the test of time, its silence should not be construed to permit the adoption and enforcement of such a policy by the States.

VI

The Natural Gas Act

The Natural Gas Act excludes direct sales to consumers from its regulatory provisions, although the construction and operation of facilities for the interstate transportation of gas require a certificate of convenience and necessity issued by the Federal Power Commission. It has not been contended in this case that any provision of that Act purports to grant to the states any regulatory jurisdiction not previously possessed. Appellees contended below that, prior to that Act, direct sales were subject to state regulation and they were intended by Congress to remain so. Appellant contends that such sales were theretofore protected from state regulation of the character involved here by the Commerce Clause, of its own force, and that such protection has in no respect been withdrawn by the Act.

The Supreme Court of Indiana did not profess to find anything in the language of the Act which purports to withdraw such protection. It concluded, however, from the failure of Congress to include direct sales in the scheme of federal regulation, from language in the Committee reports when the Act was under consideration, and from general language in some of the subsequent decisions of this Court: that Congress considered all transactions over which jurisdiction was not given to the Federal Power Commission as local matters left to state regulatory bodies; that Congress did not believe uniformity in

the regulation of direct sales to be necessary; and that Congress did not believe the national interest in the regulation of such business outweighed local needs (R. 206, 207).

Even if the record sustained the conclusion of the court below that Congress actually entertained such views, that fact in and of itself could neither have changed the existing law nor have withdrawn from appellant's business any protection of the Commerce Clause which it had previously enjoyed. Congress may, of course, redefine the distribution of power over interstate commerce (*Southern Pac. Co. v. Arizona*, 325 U. S. 761, 769; *Prudential Ins. Co. v. Benjamin* (1946), 328 U. S. 408, 434) so as to remove the protection of the Commerce Clause, but this Court has never held that this can be done by a mere failure to include a wholly interstate phase of a business in a scheme of federal regulatory legislation, regardless of what belief as to existing law may have motivated the omission. More than a hundred years ago in *Postmaster General of U. S. v. Early* (1827), 12 Wheat. 136, 148, Chief Justice Marshall said that "a mistaken opinion of the legislature concerning the law does not make law."

Establishment of a principle that the intention of Congress to remove the protection of the Commerce Clause, not expressed in actual legislation, may be ascertained by inference from isolated statements made in committee reports, or statements by witnesses at hearings, as to the possible reasons for its failure to enact particular legislation would give rise to endless uncertainty and be fraught with serious and far-reaching consequences.

Actually there is no reliable or conclusive evidence that the problem of direct sales of gas to industrial consumers was given any extended consideration by Congress in the enactment of the Natural Gas Act. The primary problem to be dealt with was that the states were limited in exer-

cising their authority to regulate consumer rates of their local distributing companies because there was no regulation of the price the distributing companies were required to pay to the pipeline companies. As stated in *Colorado-Wyoming Gas Co. v. Federal Power Comm.* (1945), 324 U. S. 626, 630, 89 L. Ed. 1235, 1239, " * * * the purpose of the Act was to provide 'an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation.' "

As noted by the court below (R. 206), it is stated in Report No. 709, 75th Cong., 1st Sess., referred to by this Court in *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U. S. 456, 467, that:

"The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of Congressional prohibition subject to state regulation. (See *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23)."

"There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction."

Citation of the *Pennsylvania Gas Co.*, case in support of the statement made indicates that the reference was to sales to local consumers of the character involved in that case. As previously pointed out, this Court in *Arkansas-Louisiana Gas Co. v. Dept. of Public Utilities* (1938) 304 U. S. 61 had left the question of direct sales to industrial consumers open for future determination.

The report of the "Hearing before the Sub-Committee of the Committee on Interstate and Foreign Commerce of

the House of Representatives" (74th Congress, 2nd session) on H. R. 11662,⁵ April 1936, incorporated as a part thereof the brief of Mr. Dozier A. DeVane, then Solicitor for the Federal Power Commission, which brief was submitted to the Committee by Mr. DeVane at the time of his appearance for the purpose of explaining the various sections of the bill. In speaking of direct sales, Mr. DeVane said in his brief (p. 17 of the said report):

"The bill makes no attempt to regulate the production or gathering facilities of a natural-gas company. * * * *Likewise natural gas in the process of transportation in high-pressure mains in interstate commerce for industrial use is excluded upon the basis that such sale is made under highly competitive conditions and is not imbued with a public interest.*" (Italics supplied.)

Congress had the right to determine, and, we think, did determine, that regulation of the rates for sales to large industrial consumers required no governmental regulation at that time because of the extent to which other fuels had been competitive with natural gas and the bargaining

⁵ The bill that was finally enacted by the Congress as the "Natural Gas Act" was H. R. 6586. In its report to the House (Rep. No. 709, H. Repres., 75th Congress, First Session), the Committee states that the said H. R. 6586 "is substantially identical with H. R. 12680" which, as amended, had been favorably reported by the Committee in the 74th Congress, Second Session. The H. R. 12680 referred to in the said report contained the following provision as a part of Section 1(b): "Provided, That nothing in this Act shall be construed to authorize the Commission to fix the rates or charges * * * *for the sale of natural gas for industrial use only.*" (Emphasis supplied.) An identical provision was contained in Section 1(b) H. R. 11662.

In the bill, as finally enacted, the exclusion clause is even broader in scope: Sec. 1(b) "the provisions of this Act— * * * shall not apply to *any other* transportation or sale of natural gas * * *." (Emphasis supplied.)

power of the class of consumers involved. This view is strongly fortified by Report No. 800, 80th Cong., 1st Sess., submitted July 7, 1947 by the Committee of the House on Interstate and Foreign Commerce with reference to amending the Natural Gas Act (*ante*, pp. 51-53). The report of the Hearing before the Committee on Interstate and Foreign Commerce, House of Representatives (80th Cong., 1st Sess., on H. R. 2185, etc., April 14th, *et seq.*) includes a statement of the advisory counsel of the National Association of Railroad and Utilities Commissioners expressing the view that Congress had intended in enacting the Natural Gas Act to leave to state regulation all direct sales to consumers of any character (p. 636 of said report) and incorporated in the record in support of the assertion the opinion of the Supreme Court of Indiana in this case (pp. 656 to 660).

The Association proposed the following amendments (set forth at p. 641 of said report) described (p. 635 of said report) as intended to reaffirm the original purpose of Congress when it enacted the Natural Gas Act:

“Amend section 1 of said bill by adding thereto the following subsections:

“(d) The Congress hereby declares that the regulation by the several States of the business of production and gathering of natural gas and of the transportation and sale thereof, except so far as by this act made subject to regulation by the Commission, is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to such regulation by State authority.

“(e) Except only so far as by this act made subject to the jurisdiction of the Commission, the business of production and gathering of natural gas,

and transporting and selling the same, and every part of such business, is declared to be local in character, and shall continue to be subject to regulation under the laws of the several States, and such regulation shall not be held to be a burden on interstate or foreign commerce.' "

The intention imputed to Congress by the court below is repudiated by the Committee in unmistakable language. Its Report No. 800, 80th Cong., 1st Sess., at p. 10, states:

"Your committee has considered the amendment offered by the National Association of Railroad and Utility Commissioners, proposing to permit the various States to exercise jurisdiction over direct sales, and has concluded that the adoption of the amendment would not be in the public interest but would be more likely to add to the existing confusion.

"The pipe line does not occupy a utility status with reference to direct sales. By the regulation of the utilities which serve him, the small consumer who goes about his day's work is protected from exorbitant rates, but direct sales are made to businesses, factories, etc. They are sales at arm's length. The purchaser is engaged in the business of securing fuel at the lowest possible price. He is his own protection. He does not need the aid of a regulating authority. Competition is the proper arbiter of prices in such direct sales. As in other businesses under our competitive system of free enterprise, this problem should be left to the businessmen themselves, to the pipe lines and their customers. They know the business and deal with each other on a fair-bargaining basis.

"Your committee feels that to alter the present situation would present a chaotic situation. If the States were given jurisdiction over direct sales by

a pipe line traversing several States, it would be under a dual system of control by the Federal Power Commission and the States. There is no assurance of uniformity of treatment by the different States. The power to regulate direct sales would include the power of curtailment and interruption of service. The different States would conceivably have different views on the matter of curtailment and interruption regardless of its affect on the needs for gas in other States. Curtailment and interruption of service concerns more than one State and endless confusion and conflict would arise between different States demanding gas as between States and the pipe-lines. Also it is conceivable that conflicts would arise between the Federal Power Commission jurisdiction as against the demands of the States to regulate prices, to interrupt service and to curtail service."

This language not only negatives any intention of Congress that appellant's direct sales should be left to state regulation but also negatives any belief on the part of Congress that they were subject to such regulation under the decisions of this Court at the time the Natural Gas Act was adopted. The view there expressed that no regulation of rates for such sales is presently necessary is strongly supported by that part of the record in *Colorado Interstate Gas Co. v. Federal Power Commission* (1945), 324 U. S. 581, 613, 614 referred to by Mr. Justice Jackson in his concurring opinion, in pointing out that the large industrial consumer, Colorado Fuel and Iron Company, was shown to have been adequately protected, in the absence of governmental regulation, by other fuel competition and its own bargaining power. As hereinbefore pointed out the Colorado Commission had held in 1933 (P. U. R. 1933E 349) that it had no jurisdiction over the industrial consumer sales of Colorado Interstate.

The decision of the court below derives no support from the language of the decisions of this Court rendered since the Natural Gas Act was enacted. While this Court has several times referred in its opinions to an intention of Congress in enacting that legislation to create a comprehensive scheme of regulation which would be complementary to that of the States, the Court has not in connection with any such statement been dealing with the problem of direct sales to industrial consumers.

In the language quoted by the court below from *Public Utilities Comm. of Ohio v. United Fuel Gas Co.*, 317 U. S. 456, 467 this Court said:

“The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies.”

The court below says (R. 206) that:

“Inferentially this means that those transactions over which jurisdiction was not given to the Federal Power Commission may be considered as local matters and left to state regulatory bodies.”

But the language of this Court relied on does not justify the inference that all transactions over which jurisdiction was not given to the Federal Power Commission must be classified as local. Instead, the implication is that the jurisdiction of that Commission over matters in interstate commerce is not complete since such jurisdiction is to be exercised only “to the extent defined in the Act”, and that the matters to be left to state regulatory bodies are local, rather than matters in interstate and foreign commerce. The question still remains whether the sales involved here are local as held by the Indiana court or part of an indivisible transaction in interstate commerce of primary

national concern as appellant contends and as Report No. 800, 80th Cong. 1st Sess., p. 10 strongly indicates that Congress actually believes. The Natural Gas Act does not determine this basic question.

Conclusion

The importance of this case is shown by the fact that the question presented has engaged the attention of Congress no longer ago than the Report of the Committee of the House on Interstate and Foreign Commerce (No. 800, 80th Cong., 1st Sess.) on July 7, 1947. It is stated in the report of hearings on which that Report is based that some of the largest pipeline companies are contesting the jurisdiction of the States to regulate direct sales and that there is litigation not yet concluded in Michigan as well as Indiana (p. 636). In Michigan, the lower court held with the pipeline company and an appeal is pending in the Supreme Court of that State (p. 643). Appellant operates in seven other states and, at the time this case was before the Indiana Commission, made direct sales to industrial consumers in Michigan, Illinois, Missouri, and Kansas, as well as Indiana (R. 47). Other pipeline companies have industrial consumers in many different states. It is important to the State Commissions as well as the pipeline companies to know whether the rates and service in connection with said sales are subject to agreement of the parties or to the regulatory authority of the various states. The principles which this Court lays down in this case are certain to have a far-reaching effect not only on the natural gas industry which will become increasingly more important as additional facilities become available for the long range transportation of natural gas, but on many other phases of the extent of the protection of the Commerce Clause against state regulation, or prohibition, of the sale of other fuels and commodities transported in interstate commerce.

We have shown that the orders of the Public Service Commission of Indiana complained of herein and the Statutes of Indiana upon which they are based, as applied to appellant, are repugnant to Article I, Section 8(3) of the Constitution, and it is respectfully submitted that the judgment of the Supreme Court of Indiana in this case should be reversed and the judgment of the Circuit Court of Randolph County, State of Indiana, should be affirmed.

Respectfully submitted,

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Attorneys for Appellant.

Appendix

Indiana Acts 1913, ch. 76, Sec. 97 as added by Acts 1945, ch. 53, Sect. 1, p. 110 (Burns' Ind. Stat. Ann. 1933, 1945 Pocket Supp. Sect. 54-601a):

Chapter 53

An Act to amend an act entitled "AN ACT concerning public and municipally owned utilities, authorizing municipalities to hold, own, acquire, construct and operate utilities and to issue bonds to pay therefor, providing the manner in which such municipalities may acquire and pay for such utilities, abolishing the railroad commission of Indiana and conferring the powers of the railroad commission on the public service commission," approved March 4, 1913, as said title was amended by Chapter 190 of the Acts of 1933, approved March 8, 1933, by adding thereto a new section numbered section 97a, providing for the granting, transfer and revocation of certificates of public convenience and necessity for the rendering of gas utility service direct to consumers in rural areas in the State of Indiana, and declaring an emergency. (H. 295. Approved February 26, 1945.)

Public Service Commission Act—New Section—Section 97a—Meaning of Terms—Concerning Granting, Transfer and Revocation of Certificates of Public Convenience and Necessity for Gas Utility Service Direct to Consumers in Rural Areas—Amendment.

Section 1. Be it enacted by the General Assembly of the State of Indiana: That the above entitled act be and is hereby amended by adding thereto, immediately following section 97 thereof, a new section to read as follows:

Sec. 97A. (a) When used in this section, unless the context otherwise requires.

Appendix

(1) the term "gas" means and includes natural gas, artificial or manufactured gas, and mixed gas, or any of them;

(2) the term "necessity certificate" means a certificate of public convenience and necessity issued by the commission pursuant to the provisions of this section, which certificate shall be deemed an indeterminate permit;

(3) the term "rural area" means territory within the State of Indiana that is outside the corporate limits of a municipality;

(4) the term "gas utility" means and includes any public utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the State of Indiana for his, its or their domestic, commercial or industrial use, and

(5) the term "gas distribution service" means the furnishing or sale of gas directly to any consumer within the State of Indiana for his or its domestic, commercial or industrial use.

(b) It is hereby declared that in order adequately to protect the public interest in the distribution of gas to consumers within the State of Indiana, it is necessary and desirable that to the extent provided herein the holding of necessity certificates should be required as a condition precedent to the rendering of gas distribution service in rural areas of the State of Indiana.

(c) After the date that this section becomes effective, no gas utility shall commence the rendering of gas distribution service in any rural area in the State of Indiana in which it is not actually rendering gas distribution service at the effective date hereof, without first obtaining from the commission a necessity certificate authorizing such gas dis-

Appendix

tribution service, defining and limiting specifically the rural area covered thereby, and stating that public convenience and necessity require such gas distribution service within such rural area by such gas utility; and no gas utility hereby required to hold a necessity certificate for any rural area shall render gas distribution service within such a rural area to any extent greater than that authorized by such necessity certificate or shall continue to render gas distribution service within such rural area if and after such necessity certificate has been revoked or transferred as in this section provided.

(d) Whenever any gas utility proposes to commence the rendering of gas distribution service in any rural area in which it is not actually rendering such service at the date on which this section becomes effective, it shall file with the commission a verified application for a necessity certificate covering such service by it. The commission shall, by regulations, prescribe the form of application and such application shall conform to such prescribed form. Within a reasonable time after the filing of any such application the commission shall fix a time and place for public hearing thereon. Notice of such hearing shall be given in such manner and to such persons as is from time to time required by law or by the regulations of the commission. Such hearing shall be held in the manner prescribed for a hearing in sections 57 to 71, both inclusive, of this act, and the provisions of such sections so far as applicable shall apply to such hearing. Any person interested in such proceedings, including without limiting the generality of the foregoing any gas utility rendering gas distribution service within the general service area (including territory within and without municipalities) of which the rural area covered by the application may reasonably be deemed a part, shall be permitted to appear either in person or by attorney and

Appendix

offer evidence in support of or opposition to the application. The applicant shall, at all times, have the burden of proving by evidence each of the matters hereinafter specified as necessary to be found by the commission before a necessity certificate shall be issued by it. If the commission shall find from the evidence, including such evidence, if any as the commission may cause to be introduced as a result of any investigation which it may have made relative to the matter, that the applicant therefor has lawful power and authority to obtain such necessity certificate and to render the proposed gas distribution service if it obtains such certificate, that he or it has the financial ability to provide the proposed gas distribution service, that public convenience and necessity require the rendering of the proposed gas distribution service, and that the public interest will be served by the issuance of the necessity certificate to him or it, the application shall be granted, subject to such terms, restrictions and limitations as the commission shall determine to be necessary and desirable in the public interest; otherwise the application shall be denied.

(e) Upon approval by the commission given after notice and public hearing given and held in the manner provided for in subdivision (d) of this section in cases of applications for necessity certificates, but not otherwise, any necessity certificate may (1) be sold, assigned, leased or transferred by the holder thereof to any person, firm or corporation to whom a necessity certificate might be lawfully issued, or (2) be included in the property and rights encumbered under any indenture of mortgage or deed of trust of such holder.

(f) Any necessity certificate may, upon application by the holder thereof to the commission, be revoked by the commission, in whole or in part, after notice given and hearing held in the manner provided for in cases of ap-

Appendix

lications for necessity certificates. Any necessity certificate may, after notice given and hearing held in the manner provided for in cases of applications for necessity certificates be revoked by the commission, in whole or in part, for the failure of the holder thereof to comply with any applicable order, rule or regulation prescribed by the commission in the exercise of its powers under this act, or with any term, condition or limitation of such necessity certificate.

Emergency.

Sec. 2. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. 69

PANHANDLE EASTERN PIPE LINE COMPANY,

Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF INDIANA, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

APPELLANT'S REPLY BRIEF

IRA LLOYD LETTS,
JOHN S. L. YOST,
ALAN W. BOYD,
Attorneys for Appellant.

INDEX

CASES CITED

PAGE

American Bridge Company v. Smith (Mo. 1944), 179 S. W. (2d) 12	9
Arkansas-Louisiana Gas Company v. Department of Public Utilities, 304 U. S. 61	19
Arkansas-Louisiana Gas Company v. Hardin (Ark. 1944), 176 S. W. (2d) 903	9
First Iowa Hydro-Electric Coop v. Railroad Commission, 328 U. S. 152, 164	3
Hoopeston Canning Co. v. Cullen, 318 U. S. 313	8
Industrial Gas Company v. Public Utilities Commission of Ohio, 135 Oh. St. 408	6
Milk Control Board v. Eisenberg Farm Products, 306 U. S. 346	3
Mississippi River Fuel Corporation v. Smith (Mo. 1942), 164 S. W. (2d) 370	9
Missouri ex rel. Barrett v. Kansas Natural Gas Company, 265 U. S. 298, 308-309	5
Munn v. Illinois, 94 U. S. 113	10
Orndoff v. Public Utilities Commission of Ohio, 135 Oh. St. 438	6
Panhandle Eastern Pipe Line Company v. Federal Power Commission, 324 U. S. 635, 647	7
Parker v. Brown, 317 U. S. 341	4
Paul v. Virginia, 8 Wall. 168	8
Producers Transportation Co. v. Railroad Commission of the State of California, 251 U. S. 228 ..	6
Prudential Insurance Company of America v. State of Indiana, 328 U. S. 823	8

	PAGE
Rice v. Board of Trade, 331 U. S. 247	1
Rice v. Santa Fe Elevator Corporation, 331 U. S. 218	1, 3
Robertson v. California, 328 U. S. 440	8
Southern Kraft Corporation v. Hardin (Ark. 1943), 169 S. W. (2d) 637)	9, 10
State ex rel. Cities Service Company v. Public Service Commission, 337 Mo. 809, 85 S. W. (2d) 890 cert. den. (1936), 296 U. S. 657	8, 9
State ex rel. Panhandle v. Public Service Comm. (Mo. 1936), 93 S. W. (2d) 675	9
Terminal Taxicab Company v. Kutz, 241 U. S. 252	6
Townsend v. Yeomans, 301 U. S. 441	10
United States v. Southeastern Underwriters Associa- tion, 322 U. S. 533	8

STATUTES CITED

Natural Gas Act

Sections 7 (c) and (e) (15 U. S. C. Sections 717 f (c) and (e))	3
Section 7 (a) (15 U. S. C. Section 717 f (a))	3

IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. 69

PANHANDLE EASTERN PIPE LINE COMPANY,

Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF INDIANA, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

APPELLANT'S REPLY BRIEF

In replying to the briefs of the Appellees and the *Amicus Curiae* (herein called collectively "Appellees"), Appellant will not burden the Court with a repetition of what is said in its main brief. We shall confine our discussion primarily to certain cases and authorities cited by Appellees which are not mentioned in our main brief.

1. Appellees cite the recent decisions of this Court in *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, and *Rice v. Board of Trade*, 331 U.S. 247. Those cases involved the question of conflict between federal regulation and state regulation of transactions historically regarded as intra-state but subject to federal regulation because they directly

affected interstate commerce. Mr. Justice Douglas said, 331 U. S. 230:

"Congress legislated here in a field which the states have traditionally occupied. . . . So we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

In the case at bar, the State of Indiana seeks to regulate in a field traditionally exempted from state regulation by the Commerce Clause. Furthermore, Mr. Justice Douglas pointed out (331 U. S. 236) that, where Congress has enacted regulatory legislation, it "can act so unequivocally as to make clear that it intends no regulation except its own." We have shown in our main brief (pp. 57-65) that, when it enacted the Natural Gas Act, Congress examined the whole field of interstate commerce in natural gas and determined that interstate pipe line sales directly to industries should not be regulated; that, when the National Association of Railroad and Utility Commissioners (*Amicus* here) sought at the last session of Congress to amend the statute so as to permit state regulation of direct pipe line sales to industrial consumers, its proposed amendment was rejected. In this connection, incidentally, we think the remarks of the Corporate Appellees regarding Representative Ross Rizley (p. 42 of their brief) are highly inappropriate, if not scandalous. Mr. Rizley was not a member of the House Committee on Interstate and Foreign Commerce and House Report No. 800 was not "his report."

The Natural Gas Act confers on the Federal Power Commission jurisdiction over many phases of Appellant's business which affect Appellant's ability to make direct sales to industries and the character and extent of the service which it can undertake to render. Expansion of pipe line capacity to serve increased demands cannot be undertaken without

authorization under Sections 7(c) and (e) of the Natural Gas Act (15 U. S. C. Sections 717 f (c) and (e)); the Commission may, under Section 7(a) (15 U. S. C. Sec. 717 f (a)) compel Appellant "to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural gas or artificial gas to the public; . . .".

In *Rice v. Santa Fe Elevator Corporation*, 331 U. S. 218, 236, this court said:

"The test, therefore, is whether the matter on which the state asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the state." (Italics added.)

In authorizing the Appellant to construct and operate the facilities necessary to supply the duPont Company at Fortville, Indiana, the Federal Power Commission specifically found (R. 114) that:

"the proposed transportation and service by Panhandle Eastern to E. I. duPont de Nemours are and will be required by the present and future public convenience and necessity . . ."

Certainly, jurisdiction in the Indiana Commission to make a contrary finding and to prohibit such service would present a conflict between state and federal regulation of interstate commerce. Cf. *First Iowa Hydro-Electric Coop. v. Railroad Commission*, 328 U. S. 152, 164, cited by Appellees.

2. *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346, is clearly distinguishable on its facts, which are

succinctly stated in the opinion of the Court (306 U. S. 352) as follows:

"The respondent maintains a receiving station in Pennsylvania where it conducts the local business of buying milk. At that station the neighboring farmers deliver their milk. The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of that transaction the respondent engages in conserving and transporting its own property. The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York."

Likewise, in *Parker v. Brown*, 317 U. S. 341, cited by Appellees, the state regulation was applied to the business of local producers and this Court said, 317 U. S. 361:

"... the regulation here controls the disposition, including the sale and purchase, of raisins before they are processed and packed preparatory to interstate sale and shipment. The regulation is thus applied to transactions wholly intrastate before the raisins are ready for shipment in interstate commerce."

3. In support of the assertion that all sales for consumption are local and, hence, subject to local regulation, Appellees have cited a note of Professor Thomas Reed Powell appearing in Volume 58, *Harvard Law Review*, page 1072. They lay great emphasis on his statement that "the Court has been pretty consistent in finding localism in the consuming end". The reasoning which leads Professor Powell to this conclusion is wholly inapplicable to Appellant's business of selling natural gas directly to industrial consumers as exemplified by its sales to Anchor-Hocking at Winchester, Indiana and to duPont at Fortville, Indiana. It is summed up in his statement that:

"as a vendor the utility is like the milkman who has expectancies but no binding order. It resembles not so much the railroad or the truck as the peripatetic peddler with his pack."

Appellant is, obviously, not in the position of the milkman without a binding order or the peripatetic peddler with his pack. There is nothing in the record to support the statement of the Corporate Appellees (pp. 36-37 of their brief) that Appellant is "subdividing and selling its gas at retail" and "holds its gas in Indiana after it takes it from the transmission mains subject to the demands of local consumers." Certainly this is not true of Appellant's direct sales, as shown by its contracts with Anchor Hocking and with duPont (R. 81, 67) and the stipulated facts with respect to its deliveries to Anchor-Hocking (R. 65). Appellant has a binding contract with each of these industrial companies. Its business of selling natural gas directly to industrial consumers bears no more resemblance to that of the peddler with his pack than does its business of selling natural gas under contract to local distributing companies for resale. On the other hand Professor Powell's simile does fit accurately the business of the Pennsylvania Gas Company, which, as stated by this Court in *Missouri ex rel. Barrett v. Kansas Natural Gas Company*, 265 U. S. 298, 308-309, was the business of supplying gas on demand to local consumers exactly as it would be supplied by a local distributing company which had purchased the gas for resale. As we have pointed out in our main brief (pp. 36-41) this Court has never accepted as a Constitutional principle the proposition that the use to which the purchaser intends to put a commodity sold and transported in interstate or foreign commerce determines whether such sale is entitled to the protection of the Commerce Clause. We know of no case decided by this Court which distinguishes between nationalism and localism on the basis of whether the product sold or de-

livered in interstate commerce is to be resold or consumed.

4. In support of their contention that Appellant is conducting the business of a public utility in Indiana by reason of its direct sales to Anchor-Hocking and duPont, Appellees cite *Industrial Gas Company v. Public Utilities Commission of Ohio*, 135 Oh. St. 408; *Orndoff v. Public Utilities Commission of Ohio*, 135 Oh. St. 438; *Terminal Taxicab Company v. Kutz*, 241 U. S. 252; and *Producers Transportation Co. v. Railroad Commission of the State of California*, 251 U. S. 228.

In both of the Ohio cases the companies involved had no interstate business but operated solely within the State of Ohio and the only question was the extent to which their wholly intrastate business was subject to regulation under the laws of Ohio. In fact, the *Industrial Gas Company* had long been under regulation and was seeking permission to discontinue its service to domestic consumers.

In the *Terminal Taxicab Company* case it was held that, while the taxicab company was conducting a public utility business in soliciting patrons at the railroad station and at hotels, its business of furnishing automobiles from its central garage on individual arrangements with those to be served was not to be regarded as a public utility (241 U. S. 256) and this Court directed that the decree "be modified so as to restrain an inquiry into the rates charged by the plaintiff at its garage, or the exercise of jurisdiction over the same."

In the *Producers Transportation Company* case a local California corporation sought to avoid regulation by the Railroad Commission of California as a common carrier, although the evidence showed that, in operating its oil pipe line, it had transported oil for the public generally. The issue was whether the company had been denied the protection of the due process clause of the Fourteenth Amendment and the contract clause of Section 10 of Article 1 of the Constitution. No interstate transportation

or sale was involved. It may be noted, however, that Mr. Justice VanDevanter said, 251 U. S. 230:

"It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier."

The record in this case (paragraphs 10, 11 and 12 of stipulation, R. 43-46) shows that all of Appellant's sales in Indiana both to distributors for resale and to direct industrial customers have been made under strictly private contracts. The statement in the brief of Appellee Public Service Commission of Indiana (p. 5) that Appellant operates "dehydrated plants" and "gasoline plant" in Indiana is not correct (R. 41) and must have been made inadvertently. Since the advent of the Natural Gas Act, Appellant's contracts with distributing companies have been placed on file with the Federal Power Commission as rate schedules and its contracts for the direct sale of natural gas to industrial consumers have been furnished the Commission in compliance with the Commission's rules and regulations. (Cf. *Panhandle Eastern Pipe Line Company v. Federal Power Commission*, 324 U. S. 635, 647, Note 5.)

Appellee Public Service Commission of Indiana contends (pp. 49 to 55 of its brief) that Appellant is a public utility within the meaning of the Indiana Public Service Commission law and, therefor, subject to regulation in Indiana because the Appellant is selling gas in Indiana to distributing companies for resale. It is argued that, since the Supreme Court of Indiana has ruled in this case to this effect, such ruling is binding on this Court. This argu-

ment is patently fallacious. Cases are cited in support of the proposition that an interpretation of a state statute by the highest court of such state is binding upon this Court. No case is cited, however, in support of the proposition that this Court is bound by a ruling of a state court that interstate transactions are subject to state regulation because the state court determines that such transactions constitute a utility business within the scope of a state regulatory statute.

5. Appellees cite *Prudential Insurance Company of America v. State of Indiana*, 328 U. S. 823, *Hoopston Cannery Co. v. Cullen*, 318 U. S. 313, and *Robertson v. California*, 328 U. S. 440, cases involving the insurance business. Here again, the Court was dealing with a field traditionally occupied by the states. State regulation of the insurance business had gone unchallenged from the decision of this Court in *Paul v. Virginia*, 8 Wall. 168 until its ruling in *United States v. Southeastern Underwriters Association*, 322 U. S. 533, that the business of insurance companies was sufficiently interstate in character to bring it within the scope of the anti-trust laws. The latter decision was quickly followed by the passage of the McCarran-Ferguson Act (15 U. S. C., Section 1011 *et seq.*) authorizing the continuation of state regulation of the insurance business. No statute similar to the McCarran-Ferguson Act has been enacted by Congress with respect to the Natural Gas industry.

As pointed out in Appellant's main brief (pp. 27-34), while the question has not been decided by this Court, interstate sales of natural gas directly from the interstate pipeline to industrial customers have consistently been held by other courts to be protected from state regulation by force of the Commerce Clauses.

6. The Corporate Appellees assert (p. 4 of their brief) that *State ex rel. Cities Service Company v. Public Service*.

Commission, 337 Mo. 809, 85 S. W. (2d) 890, cert. den. (1936), 296 U. S. 657 (which was cited as controlling in *State ex rel. Panhandle v. Pub. Service Comm.* (Mo. 1936), 93 S. W. (2d) 675) was "in effect overruled" by *Mississippi River Fuel Corporation v. Smith* (Mo. 1942) 164 S. W. (2d) 370. We find nothing in the opinion of the Supreme Court of Missouri in the latter case to support this contention. The case involved a Missouri sales tax and the issue was whether Mississippi River Fuel Corporation was under a duty to collect the tax from purchasers of its gas and to remit the same to the State Auditor. The Supreme Court of Missouri expressly pointed out that its prior ruling in the *Cities Service Company* case was not affected. It said (164 S. W. (2d) 376):

"The purpose of the *Cities Service* case was to determine whether that company, which transported its gas by pipe line from other states was a public utility, engaged in Missouri, in the sale and distribution of gas and as such required, under our statute, to file schedule of Rates.

"The majority opinion * * * held that *Cities Service* was not subject to regulation in Missouri. But the purpose of the *Cities Service* case was vastly different from the purpose of the present case."

Appellees also cite *American Bridge Company v. Smith* (Mo. 1944) 179 S. W. (2d) 12, *Arkansas-Louisiana Gas Company v. Hardin* (Ark. 1944) 176 S. W. (2d) 903 and *Southern Kraft Corporation v. Hardin* (Ark. (1943) 169 S. W. (2d) 637). All of these cases involved the duty of the seller to collect from the purchaser and to remit to the State a sales tax. In the *American Bridge Company* case the seller was a manufacturer of fabricated structural steel. The Supreme Court of Missouri made clear the distinction between *regulation* of commerce and a state tax imposed after the merchandise had reached its journey's end. In the two Arkansas cases the Supreme Court

of Arkansas refers to the fact that in *Arkansas-Louisiana Gas Company v. Department of Public Utilities*, 304 U. S. 61, this Court did not pass upon the question of whether the sales involved were interstate transactions. It stated that it must, therefore, adhere to its view stated in that case that, under the "broken package" rule, the sales were intrastate transactions. The Court concedes, however (*Southern Kraft Corporation v. Hardin*, 169 S. W. (2d) 637, 641) that the transporter of gas from another state is not subject to the laws of the state of delivery if he causes "the gas to be piped to a customer and received by that customer in the most direct and compact practicable form." We submit that Appellant's transportation and sale of gas to Anchor-Hocking and to duPont fully meet these requirements for exemption from state regulation.

7. Finally, Appellees cite *Munn v. Illinois*, 94 U. S. 113, and *Townsend v. Yeomans*, 301 U. S. 441 in support of the proposition that Appellant's direct sales to industrial consumers in Indiana are subject to regulation by the State of Indiana. In both of those cases, the activities sought to be regulated, while occurring in the stream of interstate commerce and directly affecting such commerce, were local in character; whereas in the case at bar the transactions involved are, of themselves, interstate commerce. Furthermore, the grain warehouses of Chicago and the tobacco warehouses of Georgia were held to be affected with a public interest because of factual considerations clearly not present here. Appellant's two direct sales in Indiana cannot be compared with the tremendous number of transactions involving the public handled by the grain elevators of Chicago and the tobacco warehouses of Georgia.

The briefs of the Appellees make it clear that they seek to uphold the jurisdiction of the Public Service Commission of Indiana in order to protect the business of the Corporate Appellees from any competition of Appellant in the sale of natural gas to large industrial plants in

Indiana. They lay great emphasis upon the financial loss which the Corporate Appellees fear they will sustain unless *Appellant* is forbidden by the Indiana Public Service Commission from making direct sales to industrial customers.

We have shown in *Appellant's* brief at pages 53-57 that this Court has never recognized local interest of this character as a basis for state regulation of interstate commerce. Nevertheless, this Court can hardly believe that the claimed losses, as prophesied by Appellees, would actually occur. The record shows that, in spite of *Appellant's* efforts to obtain direct sales in Indiana, it had obtained only one customer up to the time that these proceedings were commenced before the Indiana Commission, October 13, 1944; that this customer, Anchor-Hocking Glass Corporation, had been obtained by a contract made May 11, 1942 (R. 81); that the contract with the duPont Company was made December 14, 1944 (R. 67) but service was not commenced until authorization from the Federal Power Commission was granted July 10, 1945 (R. 112-115). On the other hand, the Corporate Appellees had 252 industrial customers throughout Indiana, and, although *Appellant* was not threatened with restraint by the State of Indiana until October 13, 1944, *Appellant* did not take a single one of these 252 industrial customers from the Corporate Appellees. It is true that prior to May 11, 1942, Anchor-Hocking was served by Indiana Gas Distribution Corporation (R. 51-52). That company, however, a local Indiana distributing company serving over 2,000 gas consumers (R. 50), wholly independent of *Appellant* (R. 52), has not intervened in these proceedings to complain of the loss of that industrial business to *Appellant*, and there is no evidence in the record to show that its service or rates to its domestic, commercial and small industrial consumers were adversely affected thereby.

Appellees would have this Court overlook the actual facts of this case and subject Appellant's interstate business to regulation by the State of Indiana on the extremely remote, speculative assumption that Appellant will, unless subjected to state regulation, take away from the Corporate Appellees all of their 252 industrial customers located in various places throughout the State of Indiana. Strangely enough, in spite of the earnestness and emphasis with which Appellees press their argument based on this prophecy as to what may happen in the future, the Corporate Appellees urge (page 20 of their brief) that

"It need not now be determined whether it would be a reasonable exercise of the state's power, and a proper discharge of its duty, to protect local interest in the business or commerce under consideration, if the Public Service Commission of the state were to issue an order forbidding Panhandle, a Delaware Corporation, to serve its gas to ultimate consumers in Indiana, * * *."

Stranger still, the Corporate Appellees assert (at page 51 of their brief) that jurisdiction of the Indiana Commission over these interstate sales by Appellant is necessary in order that Appellant may be *compelled*, through the exercise of such jurisdiction, to make direct sales to all those who desire the service; that Appellant must not be permitted "to pick and choose those customers to which it will make such sales."

In short, Appellees ask this Court to sustain state power to *forbid* direct interstate sales and to *compel* direct interstate sales regardless of the effect of such local regulation upon Appellant's interstate transportation and sale of natural gas in the other states through which its pipe line passes.

It must be conceded that Appellant cannot serve in the aggregate to all customers, including distributing utilities and direct industrial plants, over its system a greater volume of gas than the capacity of its pipe line system will transport and deliver. The construction and operation of additional pipe line facilities to increase such capacity cannot be undertaken by appellant without the authorization of the Federal Power Commission under Section 7 of the Natural Gas Act (15 U. S. C. Section 717f). Under such circumstances, Appellant must of necessity have freedom to determine whether it has the requisite pipe line capacity and supply of gas to serve additional industrial plants who may desire its service. An intolerable burden on interstate commerce would be imposed if each one of the states through which Appellant's pipe line passes could exercise the jurisdiction sought to be sustained here. A major interference with the jurisdiction of the Federal Power Commission under the Natural Gas Act over Appellant's sales of natural gas to distributing utilities for resale would certainly result.

Respectfully submitted,

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IN THE
Supreme Court of the United States

October Term, 1946

PANHANDLE EASTERN PIPE LINE COMPANY,

Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF INDIANA, et al.,

Appellees.

**BRIEF OF PANHANDLE EASTERN PIPE LINE COM-
PANY, APPELLANT, IN OPPOSITION TO MOTION
TO DISMISS OR TO AFFIRM**

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INDEX

	PAGE
Statement	1
Argument	2
Conclusion	10

CASES CITED

Arkansas Gas Co. v. Department, 304 U. S. 61	2
East Ohio Gas Company v. Tax Commission, 283 U. S. 463	8
Freeman v. Hewitt U. S. , 67 S. Ct. (Adv. Ed.) 274	8
Illinois Natural Gas Co. v. Central Illinois Public Service Company, 314 U. S. 498	8
Missouri ex rel. Barrett v. Kansas Natural Gas Co., 265 U. S. 298	8
Natural Gas Pipe Line Company v. Slattery, 302 U. S. 300	2
Pennsylvania Gas Company v. Public Service Commission, 252 U. S. 23	10
Peoples Natural Gas Co. v. Public Service Commission, 270 U. S. 550, 554	8
Public Utilities Commission v. United Fuel Gas Company, 317 U. S. 456	5, 8
Senn v. Tile Layers' Union, 301 U. S. 468	7
Southern Natural Gas Corp. v. Alabama, 301 U. S. 148	8
State Corporation Commission v. Wichita Gas Company, 290 U. S. 561, 563	8
State ex rel. Cities Service Co. v. Public Service Commission (1935), 85 S. W. (2d) 1890, cert. denied (1936) 296 U. S. 657	10

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PANHANDLE EASTERN PIPE LINE COMPANY,

Appellant,

THE PUBLIC SERVICE COMMISSION OF INDIANA, et al.,

Appellees.

BRIEF OF PANHANDLE EASTERN PIPE LINE COMPANY, APPELLANT, IN OPPOSITION TO MOTION TO DISMISS OR TO AFFIRM

Statement

The Public Service Commission of Indiana and the members thereof (being the principal appellees herein) have filed a motion to dismiss the appeal herein on the ground that the case presents no substantial federal question or, in the alternative, to affirm the judgment of the Supreme Court of Indiana, from which this appeal is taken, on the ground that "the questions upon which this decision depends are so unsubstantial as to need no further argument", and they rely for support of their motion upon their "Statement of Grounds Making Against the Jurisdiction of This Court" to which the motion is attached.

Appellant has set forth fully in its Statement as to Jurisdiction on Appeal, filed with its appeal papers herein: the nature of the case and the statutory provisions sustaining jurisdiction; the state statutes, the validity of which is involved; the date of the judgment appealed from and the date on which the application for appeal was presented and allowed; the manner in which the federal question was raised; the opinions below; and the grounds upon which it is contended that the questions involved are substantial. A restatement here of those matters would be repetitious and burdensome to the Court, and, therefore, appellant incorporates herein, by reference, its aforesaid Jurisdictional Statement and respectfully refers the Court to such statement for a full exposition of these matters and, particularly, the grounds upon which appellant contends that a substantial federal question is presented and appellees' motion should be denied. Our discussion herein will be confined to a reply to certain arguments advanced by appellees, in support of their motion, which are not fully covered in appellant's Jurisdictional Statement.

Argument

1. Appellees contend that the order herein involved is of the type which was before this Court in *Arkansas Gas Co. v. Department*, 304 U. S. 61 and *Natural Gas Pipe Line Company v. Slattery*, 302 U. S. 300. That is not so; those cases are clearly distinguishable from this case.

In the Arkansas case, the Gas Company was engaged extensively in local sale and distribution of gas, which business was conceded to be subject to local regulation, and was also engaged in making interstate sales directly to "pipeline customers." It refused to give the information requested by the state regulatory body with respect

to its interstate sales. This Court said (304 U. S. 63):

In such circumstances it may be highly important for the state authorities to have information concerning all its operations.

The Gas Company did not, as the appellant did here, offer to supply the data for the information of the state authorities.

In the Natural Gas Pipe Line Company case, a similar situation was presented in that the local distributing company under investigation by the Illinois Commission was so closely affiliated with its interstate supplier, Natural Gas Pipe Line Company, that information with respect to the reasonableness of the rate charged the local distributing company was deemed essential in fixing reasonable rates for the sale of gas by the latter. The order in that case merely directed the Natural Gas Pipe Line Company to make its accounts and records available for examination by the Commission. Natural Gas Pipe Line Company refused to permit the Commission to have access to its books and records and sought an injunction without exhausting its administrative remedies.

Here, appellant has only two direct sale customers in Indiana, no local distribution at all, and no affiliation of any kind with the Indiana distributors which it supplies. Its rates to these distributors are fixed by the Federal Power Commission. Appellant has not only exhausted its administrative remedies but has shown that, recognizing the import of this Court's decision in the Arkansas case, it offered to supply the material required by the order for the information of the Indiana Commission. The Commission refused this offer. It said (R. 239):

The Commission certainly has no desire that any of the parties to this cause, or the court before whom the Appeal is pending, or any consumer, public utility or other interested person, should be in any doubt as

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to the conclusions to which the Commission came in this cause as to its regulatory jurisdiction over sales direct to Indiana consumers of natural gas that has moved into the state in interstate commerce. The Commission thought that position was made as clear as language could make it by the findings and opinion in the Original Order. Though not required by statute to incorporate in an order either findings or opinion, the Commission did in the Original Order, because of the importance of this matter and to the end that the parties should be fully informed as to its conclusions, set forth in detail both its findings and its opinion as to its regulatory control. After an extended discussion of its views, the Commission said unequivocally therein (p. 82) that it concluded 'that the distribution in Indiana by Panhandle of natural gas direct to consumers is subject to regulation by this Commission under the laws of this state.' Those laws place on the Commission, as the state regulatory agency, the power and duty, whenever action is necessary in the public interest, to make reasonable regulations of rates and service. This duty the Commission proposes to exercise when and as public interest requires action. The conclusion above quoted did and does express its position on this question. . . .

IT IS THEREFORE ORDERED BY THE PUBLIC SERVICE COMMISSION OF INDIANA that the request contained in Respondent's offer that the Commission modify, change or limit the scope of the Original Order be and the same is hereby denied; that Respondent's Offer be, and the same is hereby rejected by the Commission; *that a conditional filing, as proposed by Panhandle in Respondent's Offer, of the tariffs of rates, rules and regulations, the annual reports and the accounting information, or any of them, required to be filed by Panhandle by and under the Original Order will not constitute compliance with the Original Order,*

and that the tariffs of rates, rules and regulations, the annual reports and the accounting information, when filed, shall be deemed to be on file for and to be available for use by the Commission for, all purposes and uses required or permitted by the provisions of the Public Service Commission Act and the rules and regulations of the Commission promulgated thereunder, including, but without limitation, the use thereof in and in connection with the regulation of rates and service appertaining to the supplying of natural gas by Panhandle direct to consumers within the State of Indiana. (Emphasis supplied.).

Appellees' contention that the orders of the Indiana Commission in this case went no further than those involved in the Arkansas and Illinois cases was rejected by the Supreme Court of Indiana. It said (R. 261):

We hold that the orders of the Commission, in this case, constitute an unequivocal assertion of power and jurisdiction to regulate and fix rates upon sales of natural gas from appellees' interstate pipe line direct to large industrial consumers of gas in Indiana, and that they were sufficient to present to the trial court and to this court the question of the jurisdiction and power of appellant Commission to fix rates for such sales and service and to make regulations with reference to same.

We submit that this precise question is settled by the decision of this Court in *Public Utilities Commission v. United Fuel Gas Company*, 317 U. S. 456. In that case, the Public Utilities Commission of Ohio, while investigating rates charged by a local distributing company to the City of Portsmouth, Ohio, concluded that sales to that company by United Fuel Gas Company, of gas transmitted in interstate commerce, constituted a public utility service as defined by the Ohio statute, and that, consequently, it

had authority to regulate rates for those sales as well as for the distribution rates of the local company. Acting on this conclusion, it entered an order directing United to furnish "all relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to the Portsmouth Gas Company for the furnishing of natural gas for distribution within the City of Portsmouth, Ohio." United filed a petition for rehearing asserting that its sales to Portsmouth were in interstate commerce; that the two companies were independent; and that the Commission had gone beyond its power in asserting jurisdiction to fix rates for United's sales to the local company. United offered, however, to produce any evidence in its possession relevant to a determination of reasonable rates to be charged by the Portsmouth Gas Company. The offer was not accepted and the petition was denied. In denying United's contention the Commission made a finding which appears as footnote 1 in this Court's opinion (317 U. S. 459) as follows:

The Commission further finds that the furnishing of natural gas by the United Fuel Gas Company to the Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio; that the rates to be charged therefor are subject to the jurisdiction of this Commission; that such jurisdiction includes the right to regulate the rate or price to be charged for such service, and that the exercise of such jurisdiction is necessary for a determination of the matters and things herein at issue before this Commission.

It should be noted that the offer to furnish information made by appellant in this case went beyond the offer made by United. United offered only to furnish information relevant to the determination of an issue over which the Commission had unquestioned jurisdiction. Appellant of-

ferred to furnish the precise information specified by the Commission in its order, conditioned only on its being received as information without prejudice to the issue of regulatory authority.

When United's offer was refused, it commenced immediately an action for injunction in the federal court. This Court affirmed a decree enjoining the Commission from proceeding further. In so doing it held:

- (a) That the Commission had no jurisdiction to regulate United's rates; that, under the Natural Gas Act, "the Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies" (317 U. S. 467); and
- (b) That United was not required to await an actual regulatory order before testing the validity of the Commission's action since, under the circumstances, the order to furnish evidence constituted an assertion of regulatory jurisdiction which the Commission did not possess (317 U. S. 468-470).

2. Appellees assert, citing *Senn v. Tile Layers' Union*, 301 U. S. 468, that appellant is foreclosed from contending that the Supreme Court of Indiana erred in finding that the appellant is a public utility within the meaning of the Indiana statutes and, on the basis of this finding, holding that the provisions of the Public Utility Act of Indiana can be constitutionally applied to appellant's business in Indiana. In making this finding, the Supreme Court of Indiana relied not only on appellant's interstate sale to Anchor-Hocking Glass Company but also on its interstate sales to local distributing companies, most of whom are interveners in this case.

We submit that *Senn v. Tile Layers' Union* is, on the contrary, an authority in support of appellant's conten-

tion in this regard. In that case this Court denied a motion to dismiss the appeal, holding that the question, whether the state statute, *as construed* and *applied*, violated the Fourteenth Amendment, presented a substantial federal question which had never been expressly passed upon by this Court. Here, the question, whether the Public Utility Act of Indiana, *as construed* and *applied* to appellant's sale of gas directly to Anchor-Hocking Glass Company, violates the Commerce Clause, presents a substantial federal question which has never expressly been passed upon by this Court. The holding of the Supreme Court of Indiana that appellant's sales in Indiana to local distributing companies for resale make it a public utility subject to regulation by the State of Indiana is clearly error and should be reviewed and reversed. *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298; *Peoples Natural Gas Co. v. Public Service Commission*, 270 U. S. 550, 554; *State Corporation Commission v. Wichita Gas Company*, 290 U. S. 561, 563; *Illinois Natural Gas Co. v. Central Illinois Public Service Company*, 314 U. S. 498; *Public Utilities Commission v. United Fuel Gas Company*, 317 U. S. 456.

3. Appellees contend that, because this Court upheld the state taxes involved in *Southern Natural Gas Corp. v. Alabama*, 301 U. S. 148 and *East Ohio Gas Company v. Tax Commission*, 283 U. S. 465, "a fortiori" police regulation of the type involved in this case" must be sustained. Appellees rely for support of this proposition upon language which appears in this Court's opinion in the recent case of *Freeman v. Hewitt*, — U. S. —, 67 S. Ct. (Adv. Ed.) 274. We think that appellees have failed to comprehend the import of the Court's full discussion of the scope of the Commerce Clause in that case. We submit that the controlling principles announced by this Court in that case require that the decision of the Supreme Court of Indiana in this case be reviewed and reversed.

4. Appellees attempt to distinguish cases cited by appellant by asserting that the Commerce Clause of the Constitution of its own force precludes state regulation only where the subject matter regulated requires national uniformity. While we do not concede that this is a correct statement of the law, we point out that the evidence in this case clearly shows that the nature of appellant's interstate business in Indiana is such that, if regulation is to be imposed, it must be uniform in order to avoid intolerable burdens on interstate commerce.

The sale of gas to the Anchor-Hocking Glass Company is made on an "interruptible" basis; that is to say, appellant reserves the right to curtail or to completely suspend deliveries of gas when the requirements of its customers whose service is not subject to interruption (such as distributing companies supplying domestic consumers) are such that gas is not available for delivery to interruptible customers. The uncontroverted testimony of appellant's witness, O. W. Morton (R. 226-229) shows that fair and nondiscriminatory curtailment and interruption of service to interruptible customers on its system requires consideration of many factors not confined to any one State, including temperature, wind velocity and pipeline pressure at various points along the line, and must be directed by a centralized authority. Such sales and service should not be subject to regulation by the respective States in which they happen to be made.

if appellant were required by The Public Service Commission of Indiana to deliver the full requirements of Anchor-Hocking without interruption, deliveries of gas to distributors in Ohio and Michigan could be so seriously affected as to cause danger to the lives and property of domestic consumers served by such distributors. Yet, if the decision of the Supreme Court of Indiana in this case is upheld, The Public Service Commission of Indiana may,

under the Public Service Commission Act of Indiana (Burns' Indiana Statutes, Annotated, Vol. 10, pp. 335 *et seq.*, Sections 54-101 *et seq.*); regulate all phases of appellant's sales and terms of service to Anchor-Hocking Glass Company. Under this Act, The Public Service Commission of Indiana may not only prohibit appellant from making any direct sales to industries in Indiana but may compel appellant to make direct sales to new customers even though to do so may impair its ability to render adequate service to its customers in other states. Furthermore, the evidence shows that the gas which appellant sells to Anchor-Hocking Glass Company at Winchester, Indiana (R. 65-66) is used in the manufacture of products which are sold almost entirely in interstate commerce, so that the type of service and the rates for gas to this company can have very little, if any, local effect. In fact, the opinion of The Public Service Commission of Indiana incorporated with its order of November 21, 1945, shows clearly that the proceeding against Panhandle was initiated by the local distributing companies which later intervened in the case and that the only local interest which the Commission seeks to serve by regulation of appellant's direct sales in Indiana is the protection of these distributing companies from any competition presented by appellant's ability to sell gas in interstate commerce to large industrial customers. All of these facts clearly distinguish this case from *Pennsylvania Gas Company v. Public Service Commission*, 252 U. S. 23, relied upon by appellees.

Conclusion

The Supreme Court of Missouri (*State ex rel. Cities Service Co. v. Public Service Commission* (1935), 85 S. W. (2d) 1890, cert. denied (1936) 296 U. S. 657) has held directly contrary to the decision of the Supreme Court of Indiana in this case; an authoritative decision

of this Court settling the question will be of great benefit to the natural gas industry and to the numerous state regulatory bodies concerned and will prevent diversity of rulings by courts of last resort in the states where interstate pipeline companies make interstate sales of natural gas direct to large industrial customers. In its opinion below, the Supreme Court of Indiana states that "the exact question now before this Court has never been decided by the Supreme Court of the United States." While we agree with this statement, we urge that the judgment from which this appeal is taken is clearly contrary to settled principles of law established by this Court, and appellees' motion to dismiss the appeal or, in the alternative, to affirm the judgment below should be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 69

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF INDIANA,
et al.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF FOR CORPORATE APPELLEES

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INDEX

	Page
Nature of Case	1
Opinions Below	2
Jurisdiction	2-3
State Statutes Questioned by Appellant	3-4
Statement	4
Appellant's Industrial Customers	4-6
Facts Showing Nature of Appellant's Present and Proposed Business	6-9
Facilities of Gas Distributing Companies in In- diana	9
Dedication of Appellant's Facilities to Public Util- ity Service	9-12
Other Threats to Appellee Distributing Com- panies	12-16
Commission Order	16
Appellant Accepts Indiana Supreme Court's State- ment of Facts	16-17
Questions Presented	17
A. Are Appellant's Sales to Ultimate Consumers in Indiana a Public Utility Business?	17
B. If so, is this Business Subject to Indiana Regu- lation, or is it beyond all Regulation?	18
Summary of Argument	18
Summarized Discussion of Question A.	18-21
Summarized Discussion of Question B.	22-34
Argument	35

INDEX—Continued

	Page
Discussion of Appellant's Most Frequently Cited Cases—Barrett, Attleboro and Landon Cases . . .	35-46
Other Cases Cited by Appellant	46-49
Argument on Question A.	50-53
Argument on Question B.	53-57
Conclusion	57-59

TABLE OF AUTHORITIES CITED

	Page
American Bridge Co. v. Smith (Mo., 1944), 179 S. W. (2d) 12	5, 23
Arkansas-Louisiana Gas Co. v. Hardin (Ark., 1944), 176 S. W. (2d) 903	5, 23
Arkansas-Louisiana Gas Co. v. Department of Public Utilities (1938), 304 U. S. 61	46
Baldwin v. Seelig (1935), 294 U. S. 511	48
Colorado Interstate Gas Co. v. Federal Power Commission (1945), 324 U. S. 581	27, 56
Columbia Gas & Electric Corp. v. U. S. (C. C. A. 6, 1945), 151 F. (2d) 461	49
Congress, Report of House Committee Reporting H. R. 6586, i. e. Natural Gas Act (Report No. 709, 75th Congress, First Sess.)	27
Connecticut Light & Power Co. v. Federal Power Commission (1945), 324 U. S. 515	23, 24, 26, 27, 40, 57
East Ohio Gas Co. v. Tax Commission of Ohio (1931), 283 U. S. 465	23, 54, 55
Federal Power Commission v. Hope Natural Gas Co. (1944), 320 U. S. 591	27, 37
First Iowa Hydro-Electric Coop. v. Federal Power Commission (1946), 328 U. S. 152	30
Freeman v. Hewit (1947), 91 L. Ed. (Adv. Op. No. 3) 205 (Official opinion not yet available)	32, 56
Hoopeston Canning Co. v. Cullen (1943), 318 U. S. 313	29, 52
H. R. 6586 (No. 709, 75th Congress, First Sess.)	27
House of Representatives Report No. 800, 80th Congress, First Session	42
Illinois Natural Gas Co. v. Central Ill. Public Service Co. (1942), 314 U. S. 498	24, 26, 54

TABLE OF AUTHORITIES CITED—Continued

	Page
Industrial Gas Co. v. Public Utilities Commission of Ohio (1939), 135 Oh. St. 408, 21 N. E. (2d) 166 . . .	21, 51
Logansport v. Public Service Commission (1931), 202 Ind. 523	20
Lone Star Gas Co. v. Texas (1938), 304 U. S. 224 . . .	24
Mississippi River Fuel Corp. v. Smith (Mo., 1942), 164 S. W. (2d) 370	4, 5, 23
Missouri ex rel. Barrett v. Kansas Natural Gas Co. (1924), 265 U. S. 298	24, 35, 36, 37, 54
Morgan v. Virginia (1946), 328 U. S. 373	48
New York ex rel. New York & Queens Gas Co. v. McCall (1917), 245 U. S. 345, 351	21, 51
Northwestern Bell Telephone Co. v. Nebraska State Railway Commission (1936), 297 U. S. 471	33
Pennsylvania Gas Co. in re (1919), 225 N. Y. 397, 122 N. E. 2601 P. U. R. 1919C, 663	24, 55
Pennsylvania Gas Co. v. Public Service Commission (1920), 252 U. S. 23	24, 36, 44, 54
Pennsylvania v. West Virginia (1923), 262 U. S. 553	46
Port Richmond & B. P. F. Co. v. Board of Chosen Freeholders (1914), 234 U. S. 317	24
Prudential Insurance Co. v. Benjamin (June 3, 1946), 328 U. S. 408	30, 57
Prudential Insurance Co. of America v. State of Indiana (1946), 328 U. S. 823	56
Public Utilities Commission v. Attleboro Steam & Electric Co. (1927), 273 U. S. 83	24, 35, 37
Public Utilities Commission v. Landon (1919), 249 U. S. 236	24, 43, 54

TABLE OF AUTHORITIES CITED—Continued

	Page
Public Utilities Commission v. United Fuel Gas Co. (1943), 317 U. S. 456	28, 45
Rice v. Board of Trade (1947), 91 L. ed. (Adv. Op. No. 13) 1058 (Official opinion not yet available) . . .	32, 53
Rice v. Santa Fe Elevator Corp. (1947), 91 L. ed. (Adv. Op. No. 13) 1043 (Official opinion not yet available)	31
Robertson v. California (June 3, 1946), 328 U. S. 440	30, 31, 52, 57
Roland Electric Co. v. Walling (1946), 326 U. S. 657 . . .	47
Simpson v. Shepard (Minnesota Rate Cases 1912), 230 U. S. 352	24, 53
Sioux City, Iowa v. Missouri Valley Pipe-Line Co. (1931), 46 F. (2d) 819	49
Southern Kraft Corp. v. Hardin (Ark., 1943), 169 S. W. (2d) 637	5, 23
Southern Natural Gas Corp. v. Alabama (1937), 301 U. S. 148	23, 55, 56
Southern Pacific R. Co. v. Arizona (1945), 325 U. S. 761	48
State v. Prudential Ins. Co. (1945, Ind.), 64 N. E. (2d) 150 (Official opinion not yet available)	29, 56
State Corporation Commission v. Wichita Gas Co. (1934), 290 U. S. 561	24
State ex rel. Cities Service v. Public Service Commis- sion (1935), 85 S. W. (2d) 890	4
State Tax Commission v. Interstate Natural Gas Co. (1931), 284 U. S. 41	38
Terminal Taxicab Co. v. Kutz (1916), 241 U. S. 252 . . .	21
United Fuel Gas Co. v. Railroad Commission (1929), 278 U. S. 300	21, 51

TABLE OF AUTHORITIES CITED—Continued

	Page
United States v. Southeastern Underwriters Association (1944), 322 U. S. 533	29, 56
Walling v. Jacksonville Paper Co. (1943), 317 U. S. 564	48

LEGAL PUBLICATIONS

Harvard Law Review, September (1945), Vol. LVIII, No. 7, p. 1072	24, 28, 38, 39
Martindale-Hubbell Law Directory, p. 1377 of 1943, p. 1407 of 1944, p. 1802 of 1947 editions, respectively	42
Note in 82 L. ed. p. 1181, 1182	39

COMMISSION RULINGS

Federal Power Commission Order, May 28, 1947, Docket I. T-5665	33
Potter Development Co., re (1939, N. Y.), 32 P. U. R. (N. S.) 45	26

CONSTITUTIONAL PROVISIONS AND UNITED STATES STATUTES CITED

Article I, Section 8, Clause 3, U. S. Constitution	21
Title 28, U. S. C. A. 344 (a); Judicial Code, Section 237; 36 Stat. 1156; 43 Stat. 937; 45 Stat. 54	2
Title 15, Section 717 (b), U. S. C. A.; C. 556, Section 1, 52 Stat. 821	17, 25, 43, 51
Title 16, Section 824 (b), U. S. C. A.; C. 285, Section 201, Added August 26, 1935, C. 687, Title II, Section 213, 49 Stat. 847	17, 25, 51
Title 16, Section 824 (d), U. S. C. A.	17, 26, 42, 51

TABLE OF AUTHORITIES CITED—Continued

Page

SECTIONS OF BURNS REVISED STATUTES CITED

Section 54-105 Burns 1933	19
Section 54-601 Burns 1933	19, 20, 51
Section 54-601a Burns 1945 Supp., i. e. Chapter 53 Indiana Acts 1945; Section 97a Indiana Public Utility Commission Law	19, 20, 51
Section 54-603 Burns 1933	19, 20, 51
Section 54-604 Burns 1933	20, 51

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 69

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

THE PUBLIC SERVICE COMMISSION OF INDIANA,
et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF FOR CORPORATE APPELLEES

The Supreme Court of Indiana rendered its final judgment reversing the judgment of the Randolph Circuit Court of Randolph County, Indiana (R. 196). The appellant (appellee below) petitioned for a rehearing (R. 214) and on March 25, 1947 the petition for rehearing was denied (R. 220). Thereafter an appeal to this court was prayed and the appeal was allowed (R. 228).

The Indiana Supreme Court adjudged that an order of the Public Service Commission of Indiana was valid and was issued by way of asserting the jurisdiction of the Public Service Commission of Indiana, over, and the right, power and duty of said commission to regulate, appellant's

sales and service of natural gas to ultimate consumers of that product in Indiana for use by such consumers at the burner tips although such gas was gathered in other states and transported to Indiana by the appellant for the purpose of serving it to such ultimate consumers.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana (R. 196) has not been officially reported but is unofficially reported in 71 N. E. (2d) 117 and at 67 P. U. R. (N. S., 1947) 129. The appellant incorporated a written opinion of the Judge of the Randolph Circuit Court which was announced at the time the judgment was rendered by that court as Appendix B to its statement showing jurisdiction of this court in this appeal.

The finding and opinion of the Public Service Commission of Indiana, dated November 21, 1945, which was announced in connection with the issuance of the order complained of in this appeal, have not been officially reported but are set forth at R. 127-173. The first supplemental order, dated April 9, 1946 (R. 180), is reported in 63 P. U. R. (N. S., 1946) 309.

JURISDICTION

Probable jurisdiction of this court was noted May 19, 1947 (R. 235). Jurisdiction was invoked under Sec. 344 (a) of Title 28 of U. S. C. A. (Sec. 237 of the Judicial Code, as amended) (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54).

In this connection it may be stated that the office of the Attorney General of Indiana has taken the position that the United States Supreme Court has no jurisdiction to decide this appeal on the ground that no substantial federal question is involved and for the reason that only in-

formation is asked for in this order and the right of the Public Service Commission of Indiana to regulate Pan-handle's sales to ultimate consumers in Indiana is not necessarily involved. The corporate appellees have at no time participated in that controversy.

All the corporate appellees were made parties to the hearing before the Public Service Commission (R. 116) and all the parties were made defendants in the action in the Randolph Circuit Court with the right of appeal by order of that court. (R. 23 and R. 230 C.) Appellee Indiana Gas & Water Company, Inc., is the successor in interest of Public Service Company of Indiana, Inc. (R. 23).

STATE STATUTES, THE VALIDITY OF WHICH IS INVOLVED IN THIS PROCEEDING

The state statutes involved in this proceeding, the validity of which is under attack, are summarized at page 2 *et seq.* of appellant's brief. However, there is nothing in Chapter 53, Acts 1945; Section 54-601a Burns Revised Statutes 1945 Supplement (*) which is set forth in the appendix attached to appellant's brief at page 67 to justify the statement of appellant (p. 4) that "its principal purpose appears to be to vest in the commission control over competition in the sale of natural gas to industries through the requirement of a certificate of public convenience and necessity before any sale can lawfully be made." There is nothing in the amendment of 1945 to the Public Service Commission Act or in any part of the Public Service Commission Law of the State or in the Federal Natural Gas Act or the Federal Power Act to justify the statement that sales to industrial ultimate consumers are to be treated any differently than sales to any other class of ultimate

* In this brief the official publication of Indiana Statutes, i. e., Burns Indiana Statutes Annotated 1933 will be referred to as "Burns." When typographical emphasis is employed it will be that of these appellees unless otherwise indicated.

consumers are to be treated or that appellant can treat large customers any differently than it can treat small customers whether they be commercial, domestic or industrial ultimate consumers.

The State and Federal Statutes which have to do with further defining and limiting the jurisdiction of the State Public Service Commission and the Federal Power Commission will be referred to under the summary of the argument in this brief.

STATEMENT APPELLANT'S INDUSTRIAL CUSTOMERS

Appellant's statement of the case from page 6 to 8 of its brief is accepted by these corporate appellees as sufficient except it is pointed out that the twenty-three industrial customers which are referred to as receiving gas from Panhandle at the time these proceedings were commenced before the Public Service Commission (R. 47), may be classified as follows:

Two were in Kansas, service to one having been commenced in 1935 and to the other in 1944 which was at or about the time these proceedings were commenced on October 13, 1944 (R. 3 and 4).

Thirteen were in Missouri. Service began to twelve of those before the appellant could know that the Supreme Court of Missouri would decide that the business of selling interstate gas to ultimate consumers in Missouri including industrial ultimate consumers as well as domestic and commercial ultimate consumers could be both taxed and regulated in Missouri in *Mississippi River Fuel Corp. v. Smith* (Mo. 1942), 164 S. W. (2d) 370, which in effect overruled *State ex rel. Cities Service Co. v. Public Service Commission* (Mo. 1935), 85 S. W. (2d)

890 and on which appellant has extensively relied in these proceedings. One of the Missouri industrial customers was connected in 1943 before the Supreme Court of Missouri had again in *American Bridge Co. v. Smith* (Mo. 1944), 179 S. W. (2d) 12 expressly and in detail followed and affirmed *Mississippi Fuel Corp. v. Smith, supra*. This service was also connected before the neighboring state of Arkansas had, in most eloquent language, expressly followed the principles for which we contend in the instant case, in *Arkansas-Louisiana Gas Co. v. Hardin* (Ark., 1944), 176 S. W. (2d) 903 and *Southern Kraft Corp. v. Hardin* (Ark., 1943), 169 S. W. (2d) 637.

Five were in Illinois. In three of these instances the sales to industrial ultimate consumers were by a distributing company and it is understood that Panhandle does not deny that these sales were subject to regulation by the Illinois Commission, although the selling company was wholly owned by Panhandle, the transporting company. Two of the Illinois companies were connected, one in 1943 and one in 1944, which was about the time the appellant decided to enter upon the program of getting all the direct industrial gas business they could get under the contention that they could render the service without regulation from any source.

One of the customers named in the list appearing at R. 47 was in Indiana—the Anchor-Hocking Company. Service was connected there in 1942 in a rural area (R. 51, Stipulation 21) and it was the commencement of that service which caused the commencement of these proceedings. (R. 5.) Since these proceedings were commenced Panhandle has commenced to serve in Indiana another industrial ultimate consumer located in a rural area (R. 129, Commission Finding 4), the DuPont Plant (R. 67 and 114).

Two of the industrial consumers were in Michigan. Service there was connected in 1943 and 1944 and the appellant's right to serve natural gas to those ultimate consumers is now before the Supreme Court of Michigan. (R. 47 and p. 65 of appellant's brief.)

FACTS SHOWING NATURE OF APPELLANT'S PRESENT AND PROPOSED BUSINESS IN INDIANA

The controlling facts in this case—the facts upon which the Indiana Supreme Court based its opinion herein are carefully set forth in that court's opinion.

The record in the Indiana Supreme Court consists of approximately 1250 pages. The parties stipulated all the evidence before the Public Service Commission. The stipulations were in the form of Stipulations of Facts numbered 1 to 42 (R. 37-66) with exhibits attached; and uncontradicted Stipulations of Evidence numbered 14 to 27 (R. 87-97) with exhibits attached. The parties hereto stipulated that the Findings of Facts of the Public Service Commission set forth at pages 16 to 50 of its printed order and numbered 1 to 29, inclusive (R. 126-149), correctly summarized the evidence introduced before the commission up to the hearing in the Randolph Circuit Court (R. 231) and such evidence was not contradicted in that hearing (R. 35). It is thought that these Commission Findings will enable the court to acquire conveniently a more accurate picture of the factual situation than will the very brief statement of evidence contained in appellant's brief.

Accordingly the commission's said summarized findings will be cited as support for any statement of fact herein and reference to the page of the record will be made where a commission finding supports a statement of fact men-

tioned either by the Indiana Supreme Court or by the corporate appellees. Each commission finding refers to the original evidence in support of that finding. The material facts are as follows:

"Appellee owns a large pipe line, through which it transports natural gas from Texas and Kansas into and across intervening states, including Indiana, to Ohio and Michigan. At different points along this line, gas is diverted into branch or lateral lines, smaller in size and at lower pressure, to be delivered to distribution systems owned and operated by various municipalities and public utility corporations and directly to selected, large industrial consumers of gas within practical distance of its through line." (R. 126 and 127.)

"When these proceedings started appellee furnished gas in Indiana to 10 utilities, including the corporate appellants, and four municipalities who, in turn, distributed such gas to 112,000 residential, industrial and commercial consumers in Indiana." (R. 135.)

"One of these laterals takes off from the main line near Winchester, Indiana, and at the end of this lateral there are two branches, one leading to a meter house, through which deliveries are made to Indiana-Ohio Public Service Company, which owns a distribution system serving Winchester and nearby territory. The other branch leads to another meter house, through which gas is delivered direct to the Anchor-Hocking Glass Corporation for its own consumption. Service to Anchor-Hocking is, and service to other large industrial consumers will be, under special, privately negotiated contracts, each upon terms agreed upon for its particular case." (R. 134 and R. 135.)

"Appellee's gas enters Indiana at a pressure of about 250 pounds per square inch in 22 inch mains. After reaching Indiana the pressure is reduced to approximately 200 pounds per square inch in 16 inch

mains. When the Winchester lateral leaves the main line, pressure is reduced to 80 or 100 pounds per square inch and there is no provision whereby it may ever be returned to the main line. Thereby it is segregated from the gas flowing interstate in the main line but the continuity of flow from the source to the meter houses is not interrupted. At the meter houses referred to pressure is again reduced and some deliveries are made to Anchor-Hocking at 40 pounds per square inch and some at 10 pounds per square inch. Deliveries are made to the Indiana-Ohio Public Service Company at 9 to 25 pounds per square inch. In both cases all facilities up to the pipe on the outlet side of the meter houses are owned and operated by appellee. The Winchester lateral is located in part on public highways in Randolph County pursuant to authority granted by the Board of Commissioners of that county to a predecessor of appellee which built the line. * * * appellee's main line and other laterals could not cross the state and branch out into the areas served without at least crossing highways and probably otherwise using same pursuant to arrangement with local governmental units." (R. 134 and 135.)

"The quantity sold to Anchor-Hocking is many times the quantity sold to the Indiana-Ohio Company." [(R. 134 and R. 135) Stipulation of Fact No. 3 (R. 35) and Stipulation of Fact No. 25 (R. 55).]

"Anchor-Hocking was the only industrial consumer in Indiana served direct by the appellee at the time of the commencement of these proceedings." (R. 134 and R. 135, Commission Findings 15 and 16.)

"Subsequently, however, service direct to a DuPont plant, near Fortville, Indiana, was undertaken under contract and appellee had adopted a policy of furnishing gas direct to selected large industrial consumers in Indiana, as it is doing in other states." (R. 176 and R. 20.)

"Before appellee began serving Anchor-Hocking, Anchor-Hocking had been buying its gas from a local

distributing utility which, in turn, had purchased it from appellee or its predecessor." (R. 51 or Stipulation of Facts No. 21.)

FACILITIES OF DISTRIBUTION GAS COMPANIES OPERATING IN INDIANA

"A compilation taken from the annual reports of the gas public utilities operating in Indiana under the jurisdiction of the Public Service Commission for the year 1943 shows that the book cost of gas plant (undepreciated), exclusive of common property used in other branches of the utilities business, is in excess of \$85,000,000; that the total gas consumption in thousands of cubic feet was 48,356,978.5 and that the total gross revenues derived from such sales of gas amounted to \$26,301,204.14. It also showed that of the total consumption above mentioned in thousands of cubic feet, industrial sales amounted to \$30,323,524.8, or 62.71% of the total; and that of the gross revenues above mentioned, sales to industry produced \$10,078,079.84, or 38.32% of the total. It also showed that the total number of consumers was 451,934 of whom 432,748, or 95.75%, were domestic consumers, 17,010, or 3.76%, were commercial and 1,242, or .028%, were industrial consumers (See Public Counsellor's Exhibit No. 1)." (R. 143 or Commission Finding of Fact No. 22.) Accepted by all parties as correct. (R. 231.)

THE PUBLIC USE TO WHICH PANHANDLE HAS DEDICATED ITS FACILITIES IN INDIANA

The use to which Panhandle is putting its facilities in Indiana and plans to place them in the future is shown by Points a to e following, which points are taken from the summary of the stipulated evidence set forth in the commission's findings of facts as No. 29 a to e, inclusive (R. 147-149), immediately following, which the appellant has stipulated are correct (R. 231).

a. Panhandle has declared to Kokomo Company that "Panhandle desired, and was planning in the future, to make all industrial gas supply contracts" to large industrial users "direct with the industrial consumers; that some arrangement would have to be worked out whereby the interest of Kokomo Company in such gas sales would be continued, but the ultimate consumer would no longer be a customer of Kokomo Company, but would be a customer of Panhandle; that if Panhandle sold direct to Continental Steel Corporation, the sale would not come under the jurisdiction of the Federal Power Commission; (fol. 187) and that such was the chief objective of Panhandle in making such contract direct with the industrial consumers." (Stipulation of Evidence, Section 14.) (R. 147 and R. 87.)

b. Panhandle solicited certain large industrial consumers of Service Company and stated to Service Company "that the Federal Power Commission had previously ruled that direct sales of gas to consumers of pipeline companies were not subject to regulation by such commission; that Panhandle desired to sell as much industrial load direct to industries as possible in order to remove this segment of its business from the jurisdiction of such commission; that Panhandle proposed to sell direct to industrial consumers at the points of inter-connection between the facilities of Panhandle and the present distributing utilities, that the facilities of the present distributing utilities would be utilized to transmit the natural gas for the account of the industrial consumers, who would reimburse the distributing utilities in an amount approximating the 20% of the rate being received by them on the sale of the interruptible natural gas; that present plans of Panhandle contemplated limiting the size of interruptible industrial consumers that Panhandle desired to serve direct to such consumers as had a monthly consumption of about 10,000,000 or more cubic feet of gas; and that he (Panhandle's representative) had been directed by Panhandle to outline the plan to the sepa-

rate industrial consumers now served with interruptible gas by Service Company." Panhandle declared to Service Company (fol. 188) and certain of its industrial customers that Panhandle "intended to serve directly other large industrial gas consumers up and down the pipe line of Panhandle." (Stipulation of Evidence, Sections 15 and 16.) (R. 147 and R. 89 and 90.)

c. Panhandle refused to make any contract with Central Gas for a supply of natural gas unless it "was based upon the policy that Panhandle should undertake at some time or other to serve directly some or all of these industrial consumers which are now being served by Central Indiana with natural gas purchased by Central Indiana Gas from Panhandle." (Stipulation of Evidence, Section 20); and Panhandle declared this policy in 1942 was the policy of the Board of Directors of Panhandle and that "its policy underlying that position, is to take over and serve directly such industrial customers which it refuses to serve through Central Gas." (Stipulation of Evidence, Section 21.) (R. 149 and 92.)

d. The Chairman of the Board and the President of Panhandle both stated "that Panhandle was interested in securing directly certain industrial customers of Central Gas, but on some basis which would make such direct service by Panhandle outside the jurisdiction of the Federal Power Commission under the Natural Gas Act. Said Mr. W. G. McGuire (Chairman of the Board of Panhandle) stated at such conference that Panhandle was anxious to take over such business (direct sales to industrial customers) because it was an unregulated transaction both as to the Federal Power Commission and the Public Service Commission of Indiana (fol. 189) and that he intended to establish industrial rates on a competitive fuel basis." Said representative of Panhandle stated that "Panhandle intended to take over direct service to certain large industrial consumers of Central Gas and any negotiations would have to be with that eventuality

in mind." (Stipulation of Evidence, Section 23.) (R. 149 and 93.)

e. Panhandle seeks to sell directly any industrial plant using natural gas in quantities agreeable to Panhandle and not to sell the gas to a distributing company for resale; and declares "it is our policy to serve as much of the load as direct as possible" and that "it is their policy to obtain any place on or adjacent to their system as much direct industrial gas as they can" because Panhandle contends such business is beyond regulation by any regulatory body or agency, thus enabling Panhandle to make as much money as possible from the business. (Transcript of Cross-Examination of Oscar W. Morton, Rate Engineer for Panhandle, before Federal Power Commission on February 26, 1945, as shown at pages 44 to 46, inclusive, of Transcript of Proceedings.) (R. 149.)

**OTHER THREATS MADE TO APPELLEE DISTRIBUTING COMPANIES BY APPELLANT.
ALL PARTIES STIPULATED THE COMMISSION FINDINGS CORRECTLY
SUMMARIZED THIS EVIDENCE**

(R. 231)

1. "Oscar W. Morton, a Rate Engineer of Panhandle, testified before the Federal Power Commission on February 26, 1945, substantially as follows: Panhandle would not willingly sell and deliver gas at Fortville, Indiana, for resale to the DuPont plant because they want to make as much money as they can out of that business and they can make more money selling gas directly than by selling it to someone, who, in turn, resells it and thus brings the transaction under the jurisdiction of the Federal Power Commission. If any other industrial plants than DuPont show an interest in obtaining gas, they would want to serve them directly (fol. 182) rather than serve them through the local distributing companies. It is the declared policy of Panhandle to secure as much of the

load as direct as possible (See Public's Exhibit No. 2 and the testimony of Mr. Morton copied therefrom).'' (R. 143 or Commission Finding No. 23.)

2. "The development of its gas business in anything like its present proportion by Service Company has taken place almost wholly since natural gas was brought into Indiana by Panhandle, as hereinabove recited. This fact is illustrated by Service Company's Exhibit No. 1, which shows that for the year ended December 31, 1935, it had a total of gas customers of 41,245; whereas, at the year ended November 30, 1944, it had a total of such customers of 58,929 and that its average gas revenue per therm from residential customers went from \$.2374 in 1935 to \$.1576 for the twelve months period ended November 30, 1944 (See Service Company's 'Exhibit No. 1').'' (R. 144 or Commission Finding No. 24.)

3. "It also appeared from Service Company's Exhibits No. 2 and 3 that if Service Company were to lose all of the gas revenues classified as industrial sales by reason of the pipe line company's furnishing the same, taking over those customers for direct service, it would mean loss in gross revenue in excess of \$1,000,000 per annum based on figures for the twelve months period ending November 30, 1944, and for the same period, a loss in net operating income before provision for Federal Income Taxes of \$293,730.22. And it appeared from testimony of Mr. Schiesz that in the event of that contingency happening, Service Company would only (fol. 183) be able to dispense with less than 2% of its gas utility plant property. If Service Company's industrial load should be lost to it by reason of the industrial customers being taken over by Panhandle for direct service, only about \$100,000 of Service Company's investment in plant property could be retired and all of the remainder of its investment now devoted to gas service must be maintained and operated to serve Service Company's domestic and commercial users and the rates charged for service to the latter must necessarily be substantially increased

to justify continuing the service to them. (Service Company's Exhibit No. 1 and testimony of Mr. Schiesz).” (R. 144 or Commission Finding No. 25.)

4. “The fact that the distributing companies served natural gas to all three classes of gas consumers, i. e., industrial, commercial and domestic, has made possible a high standard of service at lower rates to the consumers in each of the three classes than would have been possible if only one of the classes had been served. It has meant that the residential and commercial customers have had the benefit of natural gas which would have been denied them unless the distributing companies' business had included service to all three classes of consumers. The installation of facilities to serve industrial consumers has made possible the development of domestic uses, including cooking and water heating, the higher B.T.U. gas for house heating and the use of gas for commercial cooking purposes by restaurants, hotels and others. All of these services under old methods were prohibitive in cost or the gas was not available in the quantities in which the customers (fol. 184) wished to use it, due to the inadequacy of facilities and of the supply of gas. It was through the development by the distributing companies of the industrial business that they have been able to improve materially the over-all load factor of gas purchased. This has also enabled the distributing companies to spread their fixed costs, such as interest, taxes and depreciation, which are constant in every-day operation, over a larger number of units of service, which automatically has given the benefit of that condition and fact to each of the three classes of consumers and has made possible the development of rates for service which were attractive not only to one of the three classes but to each of them; all of which has had the effect of promoting greater public interest in the area served by these distributing companies in the use of natural gas and in advancing the public welfare in those areas.” (R. 145 or Commission Finding No. 26.)

5. ⁴It appears from Central Gas' Exhibit No. 1 and the testimony with reference thereto of Guy T. Henry, its President (see pages 71 to 77, both inclusive, of the Transcript) that for the calendar year ended December 31, 1944, the total gross revenues from sales of gas of Central Gas amounted to \$4,076,369.11; that its sale to industrial users grossed \$2,674,265.74; that for the same period its net operating income, before provision for Federal Income Taxes, amounted to \$683,393.58; that if Central Gas should lose all of its industrial customers by reason of their being taken over by Panhandle for direct service, it would have resulted in a loss in net revenues of \$514,206.67 (see Central Gas' 'Exhibit No. 1' and the supporting schedules); that (fol. 185) if Panhandle were to take over all of the industrial customers of Central Gas for direct service, Central Gas would be able to retire only about 1% or 2% of its investment in plant property and would find it necessary to maintain and continue to use all of the remainder of its plant property in continuing to furnish service to its domestic and commercial customers; that Central Gas has approximately 26 industrial customers, each of which use in excess of twenty-five million cubic feet of gas per year, and which, in the aggregate, use approximately nine billion feet of gas per year and from which Central Gas obtains gross revenues of approximately two and one-half million dollars; that the 14 customers mentioned in Exhibit L to the Stipulation of Facts, being the Notice of Cancellation filed by Panhandle with the Federal Power Commission under date of May 18, 1943, were among such 26 industrial customers using approximately 90% of all of the gas sold by Central Gas to industrial customers; and that if Panhandle should take over this industrial business of Central Gas and serve the customers directly, it would certainly result in a substantial increase in the present rates of Central Gas to its domestic and commercial customers in order to enable it to continue to carry on its business and to pay a return on its investment." (R. 146 or Commission Finding No. 27.)

6. *It appears from Kokomo Company's Exhibit No. 1 and the testimony of its President and General Manager, Mr. Hahn, with reference thereto, that for the 12 months period ending December 31, 1944, its total gross revenues amounted to \$485,170.41, of which (fol. 186) \$198,630.79 was derived from industrial sales; that if these industrial sales had been eliminated that year, it would have resulted in a reduction in net operating income, before provision for Federal Income Taxes, from \$128,157.86 to \$21,755.78, a total loss of \$106,402.08; that if the industrial business of Kokomo Company were taken over and served directly by Panhandle the amount of plant property which Kokomo Company would be able to retire would be so slight as to be almost negligible, a matter of four or five thousand dollars; and that it would further result in a considerable revision of its present rates to domestic and commercial customers." (R. 147 or Commission Finding No. 28.)

THE COMMISSION ORDER

The Commission Order is sufficiently summarized at pages 11 and 12 of appellant's brief (R. 171 to 173) and the Commission Supplemental Order reaffirming its jurisdiction to regulate the business appellant is conducting and purposes conducting in Indiana as shown by the evidence is sufficiently summarized in appellant's brief at page 13 (R. 180 to 190).

APPELLANT ACCEPTS INDIANA SUPREME COURT STATEMENT OF FACTS WITH ONE UNJUSTIFIED EXCEPTION

At page 14 of appellant's brief it is said that:

"Most of the pertinent facts are accurately stated in the opinion of the Supreme Court of Indiana (R. 196 to 198)."

Appellant apparently takes only one exception to that statement. It says:

"That court, however, wholly ignored the evidence with reference to curtailment procedure and stated that there was nothing in the record to show that uniformity in the control of direct sales is necessary. (R. 207.)"

But the statement of facts set forth in the Indiana Supreme Court's opinion were entirely correct and did not overlook a vital point. The testimony of O. W. Morton, the appellant's engineer, is set forth at pages 174-176 of the Record. It had to do with the *transportation* of interstate gas, a process which is subject to the regulation of the Federal Power Commission as is expressly required by the language of the Federal Natural Gas Act, just as transportation is placed under the exclusive jurisdiction of that commission by the Federal Power Act. (This Act hereinafter specifically cited.) The Indiana Supreme Court correctly stated that "Uniformity in control of direct sales from interstate pipe lines to large industrial consumers does not seem to be necessary." (R. 207.) Congress felt that there should be federal regulation of the transportation in interstate commerce of interstate gas and electrical energy but saw no reason for federal regulation of sales to ultimate consumers which have always been regarded as a local matter and are to continue subject to local regulation until Congress sees fit to assume jurisdiction thereof.

QUESTIONS PRESENTED

A. Is the business the appellant is transacting and purposes transacting in Indiana—namely, the sale of gas to Indiana ultimate consumers—a public utility business which would ordinarily be subject to regulation by the State's Public Service Commission although the appellant

now says it does not now intend to serve domestic or commercial users but only industrial consumers of its own choosing?

B. If such business of the appellant is a public utility business which would ordinarily be subject to regulation by the Indiana Commission, does the fact that appellant transports the gas from beyond the state's borders and sells it in Indiana not to a distributing company for resale but direct to ultimate consumers prevent the State Commission from regulating such sales to ultimate consumers (under the alleged automatic operation of the commerce clause of the United States Constitution), although Congress has expressly refused to grant to the Federal Power Commission jurisdiction to regulate such sales to ultimate consumers? In other words, is it the law that neither the State Public Service Commission nor the Federal Power Commission can regulate appellant's business and proposed business in Indiana and that it will go unregulated by any governmental agency and the appellant can pick and choose its customers with no legal obligation to answer to any regulatory body for how it disposes of the natural gas it can gather in other states, bring to Indiana and sell to such ultimate consumers in this state as are acceptable to the appellant as customers?

SUMMARY OF ARGUMENT

A. Appellant's business and proposed business in Indiana is shown by the evidence to be a public utility business and is subject to regulation by some public agency:

1. "The term 'Public Utility' * * * shall * * * embrace every corporation * * * that * * * may own, operate, manage or control * * * any plant or equipment within the state for the production, transmission, de-

livery, or furnishing of heat, light, water or power * * * either directly or indirectly to or for the public. * * * 54-105 Burns 1933.

2. Section 54-601 Burns 1933 requires that no license or permit shall be granted to any person, corporation, etc., to operate any equipment of any ~~public utility as defined by Section 54-105 Burns 1933~~, in any municipality wherein there is already another public utility as so defined engaged in similar service without first securing a Certificate of Public Convenience and Necessity from the ~~Public Service Commission of the State after a public hearing~~, and there is no language in the statute which would exempt Panhandle from such a requirement.

3. Section 54-603 Burns 1933 provides that no license or permit shall be granted to a corporation not duly organized under the laws of the State of Indiana and Panhandle is admittedly organized under the laws of the State of Delaware.

4. Chapter 53 Acts 1945, page 110 adds a new section to the Indiana Public Service Commission Act (Sec. 97a or Sec. 54-601a Burns Supp. 1945) and provides that no gas utility (which is defined by said Chapter 53 as meaning any public utility selling or proposing to sell gas directly to any consumer within the State of Indiana for its or their domestic, commercial or industrial use) shall sell gas in rural areas in which it was not selling on the effective date of the Act without first securing a "Necessity Certificate" authorizing such service and limiting the area covered thereby and stating that public convenience and necessity require such service. Said Chapter 53 does not expressly provide that a "Necessity Certificate" which is made by the 1945 Act the equivalent of an Indeterminate Permit, can only be held by an Indiana corporation.

5. The Indiana Public Utility Law provides that a public utility company rendering public utility service is subject to the jurisdiction of, and to regulation by, the State's Public Service Commission, whether or not such service is rendered pursuant to a Certificate of Public Convenience and Necessity or an Indeterminate Permit issued pursuant to the Public Service Commission Act.

City of Logansport v. Public Service Commission
(1931), 202 Ind. 523, 540.

6. The regulation of a public utility is properly the function of the legislative department of the State government under the state's police power.

City of Logansport v. Public Service Commission
(1931), 202 Ind. 523, 533.

7. In this proceeding it need not now be determined whether it would be a reasonable exercise of the state's power, and a proper discharge of its duty, to protect local interest in the business or commerce under consideration, if the Public Service Commission of the state were to issue an order forbidding Panhandle, a Delaware Corporation, to serve its gas to ultimate consumers in Indiana, until it has taken such steps as are necessary to get a Certificate of Public Convenience and Necessity or an Indeterminate Permit within the meaning of Sections 54-601, Section 54-603 and Section 54-604 Burns 1933, to serve gas in Indiana municipalities where another public utility or a municipally owned utility is lawfully engaged in a similar service; or until Panhandle gets a "Necessity Certificate" to serve in rural areas as provided in Chapter 53 Acts 1945. These questions are not decided or involved in the order in question by the express provision of the order itself.

The order could not be held illegal or void merely because it did not deal with all the matters which might have been dealt with at the time it was issued or because it was contemplated that additional matters might be dealt with at appropriate times in the future. (R. 172 and 173.)

THE COMMERCE CLAUSE

Even though Panhandle's sale of gas to Indiana ultimate consumers be regarded as interstate commerce, Congress does not have *exclusive* power to regulate or reasonably affect such interstate commerce. Congress is given power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes," but its power is not exclusive so far as the provisions of the United States Constitution are concerned. Article 1, Sec. 8, Clause 3 U. S. Constitution.

It is what Panhandle does and offers or threatens to do, not what Panhandle says, in its charter or other similar document, which determines its status as a public utility and subjects its activities to regulation by a properly constituted public agency. Panhandle can not be heard to say it only chooses to serve its natural gas to certain customers who are located within the territory wherein Panhandle actually serves merely because other customers may not be as profitable to Panhandle as the customers it chooses to serve. (*Terminal Taxicab Co. v. Katz* (1916), 241 U. S. 252, 253; *Industrial Gas Co. v. Public Utilities Commission of Ohio* (1939), 135 Ohio State 408, 21 N.E. (2d) 166, 167; *United Fuel Gas Co. v. Railroad Commission* (1929), 278 U. S. 300, 309; *New York ex rel. New York and Queens Gas Co. v. McCall* (1917), 245 U. S. 345, 351.)

B. Appellant's sales to ultimate consumers in Indiana are subject to regulation by the Indiana Commission because Congress has refrained from entering the field and allowing the Federal Power Commission to regulate that business.

This last statement is true because such sales are of local importance as shown by the evidence, and the sale to ultimate consumers of a commodity and its consumption locally have always been regarded as local in character and not an inseparable, integral part of interstate commerce. They may not constitute interstate commerce. They may only have an effect on interstate commerce. Mere bigness, the size of the sale, does not determine constitutional rights or obligations. The federal statutes (hereinafter specifically cited) recognize only two classes of sales of interstate gas and interstate electrical energy, namely, sales for re-sale which are expressly made subject to the jurisdiction of the Federal Power Commission and all other sales, i. e., sales to ultimate consumers which are naturally subject to the jurisdiction of the state commission. Regulation of public utilities by public authority is the exercise of the police power of the state and that police power resides in the various state governments at least unless and until Congress sees fit to enter upon the performance of such police duties itself and, under the commerce clause, to undertake the burden of regulating the business involved.

1. From the first briefing of this case before the Public Service Commission until this time, these corporate appellees have always insisted that it made no difference whether the appellant's sales to ultimate consumers in Indiana be regarded as intrastate commerce or interstate commerce. They are subject to Indiana regulation until the Federal Government enters the field and gives

the Federal Power Commission or some other federal agency the power to regulate such sales.

2. There are many cases and many courts which hold that where, as here the transporting company removes gas from its interstate lines and reduces the pressure in Indiana and where there is no way by which the gas can flow back into the interstate mains but it finds permanent lodgement in Indiana in one or a series of lower pressure mains wherein it is held subject to the needs or demands of ultimate consumers, whether they be industrial, commercial or residential, the process of selling such gas to such ultimate consumers is intrastate commerce. This is what happens in the instant case and it is not for these appellees to say that the courts so holding are in error. (*East Ohio Gas Co. v. Tax Commission* (1931), 283 U. S. 465, 471; *Southern Natural Gas Corp. v. Alabama* (1937), 301 U. S. 148, 154 and 155; *Mississippi River Fuel Corp. v. Smith* (Mo., 1942), 164 S. W. (2d) 370, 373; *American Bridge Co. v. Smith* (Mo., 1944), 179 S. W. (2d) 12, 16; *Southern Kraft Corp. v. Hardin* (Ark., 1943), 169 S. W. (2d) 637, 641; *Arkansas Louisiana Gas Co. v. Hardin* (Ark., 1944), 176 S. W. (2d) 903, 905; *Connecticut Light & Power Co. v. Federal Power Commission* (1945), 324 U. S. 515, 533 and 534. (Construing and affirming the *Southern Natural Gas* and *East Ohio Gas* cases *supra* in an interstate electrical energy case.))
3. On the other hand many cases hold that the sale of interstate gas or electrical energy in a particular state, not for re-sale, but to the ultimate consumer continues to be interstate commerce but that fact does not deny to the state the right to regulate it until the federal government assumes the burden of doing so. This is true because the use of these commodities by the consuming public in the particular states have great local impor-

tance and it is the consuming public which in the final analysis the laws regulating public utility activity are designed to protect. (*Simpson v. Shepard* (Minnesota Rate Cases, 1912), 230 U. S. 352, 402; *Public Utilities Commission v. Landon* (1919), 249 U. S. 236; *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23, 28, 31; *Re Penn. Gas Co.* (1919), 225 N. Y. 397, 122 N. E. 260, 261, P. U. R. (1919C), 663, at special p. 664. (Opinion of Justice Cardozo); *Port Richmond and B. P. F. Co. v. Board of Chosen Freeholders* (1914), 234 U. S. 317, 321; *Lane Star Gas Co. v. Texas* (1938), 304 U. S. 224, 236; *Connecticut Light & Power Co. v. Federal Power Commission* (1945), 324 U. S. 515, 526; *Missouri ex rel. Barrett v. Kansas Natural Gas Co.* (1924), 265 U. S. 298, 308; *State Corporation Commission v. Wichita Gas Co.* (1934), 290 U. S. 561; *Public Service Commission v. Attleboro Steam & Electric Co.* (1927), 273 U. S. 83.)

4. In determining whether the Indiana State Commission can regulate the sale of gas or electrical energy gathered in another state, transported to Indiana and sold to an ultimate consumer in Indiana, the later view is that the question is not so much when the interstate commerce ends or intrastate commerce begins. *It is immaterial whether it be called interstate or intrastate business.*

The question is, is it important to the local community that the commerce be regulated. If so, the state commission can regulate it at least until the Federal Government enters the field. *Illinois Natural Gas Co. v. Central Illinois Public Service Commission* (1942), 314 U. S. 498; *Harvard Law Review September Issue 1945, Vol. LVIII No. 7, p. 1072, p. 1074.*

5. Congress has expressly disclaimed any intention of regulating sales of natural gas even though transported

in interstate commerce to ultimate consumers and has expressly provided that the Federal Power Commission's jurisdiction shall only "apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." Title 15, Sec. 717 (b) (U. S. C. A.) Federal Natural Gas Act; C. 556, Sec. 1, 52 Stat. 821.

6. The same intention on the part of Congress is shown with reference to the sale of electrical energy in interstate commerce. The jurisdiction of the Federal Power Commission "shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy." Title 16, Sec. 824 (b) (U. S. C. A.) Federal Power Act; C. 285, Sec. 201. Added August 26, 1935, C. 687, Title II, Sec. 213, 49 Stat. 487.

7. Congress has provided specifically with reference to electrical energy) that the amount or volume however great, of the public utility product sold, shall not have the effect of changing a sale of such product from a sale to an ultimate consumer or a retail sale to a wholesale sale. In other words, a sale at wholesale means a sale for re-sale without regard to the volume of the product involved in the sale. There can be no doubt about the meaning of the language of the act of Congress which

uses the words "sale for re-sale." Title 16, Sec. 824 (d) (U. S. C. A.) Federal Power Act.

8. In granting the Federal Power Commission jurisdiction over certain features of the interstate electrical industry in 1935 and in granting to that commission jurisdiction over certain features of the interstate natural gas industry early in 1938 it was by Congress made even clearer that the regulation of the local consumption of gas and electrical energy whatever its origin is of such local importance that each state has been recognized as having the power and right, and that a commission created for that purpose has the duty, to regulate the sale of these commodities to ultimate consumers, at least until and unless the Federal Government enters the field pursuant to the powers granted in the commerce clause. *Illinois Natural Gas Co. v. Central Illinois Public Service Co.* (1942), 314 U. S. 498, 504-507; *Connecticut Light & Power Co. v. Federal Power Commission* (1945), 324 U. S. 515, 529; *Re Potter Development Co.* (1939, N. Y.), 32 P. U. R. (N. S.) 45.

9. The House Committee which reported the Natural Gas Bill for passage (following which the bill was passed by both Houses of Congress) in its report to Congress said that the states prior to the enactment of the Natural Gas Act had authority "to regulate sales to consumers even though such sales are in interstate commerce, said sales being considered local in character and in the absence of Congressional prohibition subject to state regulation" and that "there is no intention to disturb the states in the exercise of such jurisdiction." It was emphasized that the purpose of Congress was only to provide for the regulation of sales for re-sale, i. e., to distributing companies which the states could not regulate because such sales for re-sale "have been considered to be not local in

character and, even in the absence of congressional action, not subject to state regulation." See report House Committee reporting H. R. 6586 which contains the exact words of the Federal Natural Gas Act (Report No. 709, 75 Congress, First Session.) (R. 157 and R. 206.)

10. Recent Cases Showing that Congress Intends that All Sales of Natural Gas and Electrical Energy Shall be Subject to State Regulation Except Sales For Re-sale.

The United States Supreme Court has said that:

a

The Natural Gas Act was designed to take no authority from state commissions or in any manner to usurp state regulatory authority. *Federal Power Commission v. Hope Natural Gas Co.* (1944), 320 U. S. 591, 609.

b

The jurisdiction of the Federal Power Commission extends only to those matters which are not subject to regulation by the States. *Connecticut Light & Power Co. v. Federal Power Commission* (1945), 324 U. S. 515, 517.

c

There is no distinction under the Federal Power Act or the Federal Natural Gas Act between classes of ultimate consumers. Domestic, commercial and industrial consumers are each and all to be treated alike and a sale to one class is governed by the same principles and subject to the same regulations as a sale to either of the other two classes. *Colorado Interstate Gas Co. v. Federal Power Commission* (1945), 324 U. S. 581, 596.

In passing the Federal Natural Gas Act Congress intended to create a comprehensive plan of regulation which would be complementary in its operation to that of the states. Congress contemplated a harmonious dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere, with the Federal Power Commission regulating sales for re-sale and the state commissions regulating sales to ultimate consumers, in the respective states, whether these consumers be residential, commercial or industrial. *Public Utilities Commission v. United Fuel Gas Co.* (1943), 317 U. S. 456, 467.

11. From the beginning the United States Supreme Court has allowed the states both to tax and to fix the price on the first sale or delivery of gas or electricity brought in from a sister state when and if the sale is also necessarily the last sale because it is to the ultimate consumer. *Harvard Law Review September Issue 1945*, Vol. LVIII No. 7, p. 1082 and Note; citing: *Pennsylvania Gas Company v. Public Service Commission* (1920), 252 U. S. 23; *East Ohio Gas Company v. Tax Commission* (1931), 283 U. S. 465; *Public Utilities Commission v. London* (1919), 249 U. S. 237.
12. The United States Supreme Court has always clearly drawn a line between sales to consumers and sales for re-sale—the former have always been subject to regulation by the state; the latter have not. The court has been consistent in finding “localism in the consuming end” and that “rates and receipts are local and not interstate.” Article by Prof. Powell of the Harvard Law School in the *Harvard Law Review*, September, 1945, at pages 1082, 1084 and 1089.

13. INTERSTATE COMMERCE IN INSURANCE AND ITS REGULATION BY THE STATES

The business of insurance companies which issue insurance to policy holders in several states was, in 1944, declared to be interstate commerce and subject to Federal regulation and taxation. Nevertheless such business is subject to state taxation and regulation so long as state laws do not conflict with federal laws or regulations. *U. S. v. Southeastern Underwriters Association* (1944), 322 U. S. 533.

14. Panhandle should not be permitted to nullify Indiana's reasonable regulatory requirements designed to give important protection to Indiana consumers simply because Panhandle sees fit to do business in several states (at least until the Federal Government occupies this field of regulation); just as Indiana should not lose the power to protect the interests of its policy holders in large insurance companies doing an interstate business simply because those companies see fit to do business in several states; so long, at least, as Indiana does not run counter to Federal laws or regulations. *Hoopes-Canning Co. v. Cullen* (1943), 318 U. S. 313, 320.

15. There is a wide range of business and other activities which, though subject to Federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. The power of Congress to regulate interstate commerce does not exclude all state powers of regulation. *State v. Prudential Insurance Co.* (Ind. S. C., 1945), 64 N. E. (2d) 150, 153, 155. Not yet officially reported.

16. In limiting the jurisdiction of the Federal Power Commission to sales for re-sale, Congress must have intended to leave all other sales subject to regulation by

state commissions. Congress looks to coordinated action between the states and the Federal Power Commission just as, in the case of interstate commerce in insurance, it looks to cooperation between such regulation as Congress has provided and the various insurance commissioners of the states. *The Prudential Insurance Co. v. Benjamin* (1946), 328 U. S. 408, 430, 434 to 437.

17. Although the business be interstate commerce, the state not only has the right to tax but also to regulate the Indiana part of the company's business, so long as what is done is not contrary to Federal regulations or laws. The commerce clause does not give a person a right to ignore local regulatory laws applicable to local features of the commerce merely because that person does business in several states. If the Federal Government wishes to regulate the interstate commerce it may do so, but if the Federal Government does not provide for its regulation the several states may regulate those features of the commerce which are of peculiar local importance in the respective states until the Federal Government enters the field. *Robertson v. California* (1946), 328 U. S. 440, 448, 458-460.

18. The same thing precisely can be said of the Natural Gas Act as was said of the Federal Power Act by the Supreme Court in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission* (1946), 328 U. S. 152, 167. There the court said:

"In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality

of control consists merely of the division of the common enterprise between two co-operating agencies of Government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue."

19. The indisputable facts in this case show that continued efficient service to domestic, commercial and small industrial users of natural gas and ultimately to large users of natural gas as well, in Indiana and all the other states will be placed in jeopardy if Panhandle is permitted to pick and choose its customers and to serve or refuse to serve those it pleases without regulation from any source. If this can be done as to interstate gas it can be done as to interstate electrical energy and thus state regulation of all such utility service is endangered. (Commission's undisputed findings Nos. 24 to 28, inclusive (R. 144-147 and R. 231(c)), which the parties have stipulated are correct.)

20. The commerce clause does not give to one engaged in interstate commerce the right to import into a state anything such person pleases free of a reasonable exercise of the police power of the particular state simply because Congress has not acted in the premises. *Robertson v. California* (1946), 328 U. S. 440, 458.

21. The same reasoning can be applied to the Federal Natural Gas Act as was applied to the United States Warehouse Act in *Rice v. Santa Fe Elevator Corp.*, 91 Law. Ed. (Adv. Op. No. 13) 1043. (Official opinion not yet available.) There at page 1049 the court said:

"Congress legislated here in a field which the States have traditionally occupied. See *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 148, 149, 88 L. ed. 635, 639, 640, 64 S. Ct. 474. So we start with the assumption that

the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

22. In the case last cited the majority opinion in no way conflicts with the following statement in the minority opinion, to-wit:

"Suffice it to say that due regard for our federalism, in its practical operation, favors survival of the reserved authority of a State over matters that are the intimate concern of the State unless Congress has clearly swept the boards of all State authority, or the State's claim is in unmistakable conflict with what Congress has ordered."

23. "A police regulation of local aspects of interstate commerce is a power often essential to a state in safeguarding vital local interests. At least until Congress chooses to enact a nationwide rule the power will not be denied to the state (Authorities)." *Freeman v. Hewit*, 91 L. Ed. (Adv. Op. No. 3), 205, 208. (Official opinion not yet available.)

24. The question is not whether the Public Service Commission *might* issue an order which would be invalid because in conflict with some federal law, rule or regulation. The question is, is the issuance of the order in question, as far as it goes, within the jurisdiction of the state commission. This principle is shown by *Rice v. Board of Trade*, 91 L. ed. (No. 13 Adv. Op.) 1058, 1062 (Official opinion not yet available), where the court said:

"Until it is known what rules the Illinois Commission will approve or adopt, it cannot be known whether there will be any conflict with the federal law. Any claim of supersedure can be preserved in the state proceedings. And the question of supersedure can be determined in light of the impact of a specific order of the state agency on the Federal Act or the regulations of the Secretary thereunder. Only if that procedure

is followed can there be preserved intact, the whole state domain which in actuality functions harmoniously with the federal system. For even action which seems pregnant with possibilities of conflict may, as consummated, be wholly barren of it."

25. In appellant's statement as to jurisdiction on appeal, and in the note on page 3 of appellant's brief, it cites *Northwestern Bell Telephone Company v. Nebraska State Railway Commission*, 297 U. S. 471, to show that an order of a state Public Service Commission constitutes a "statute within the meaning of the term as used in Title 28, U. S. C., Sec. 344 (a)," and these corporate appellees take no exception to that position but that case also holds that until Congress or a federal commission prescribes depreciation rates applicable to a business engaged in interstate commerce, the state commission may prescribe such rates. Said the court at page 478:

"It cannot be supposed that Congress intended by the amendment to § 20 (5) to preclude all regulation, state and national, of depreciation rates for telephone companies, for an indefinite time, until the Interstate Commerce Commission could act administratively to prescribe rates. (Authorities.) In *Smith v. Illinois Bell Teleph. Co.*, 282 U. S. 133, 139, 75 L. Ed. 255, 51 S. Ct. 65, this court pointed out that until the Interstate Commerce Commission has prescribed depreciation rates the prerogative of the state to regulate such rates cannot be gainsaid. (Authorities.)"

26. In the matter of *Connecticut Light & Power Co.*, Federal Power Commission Docket I. T-5665, an order was issued dated May 28, 1947 to implement the decision of this court in *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515. The Commission had issued an order to the utility respecting the sale of electrical energy for consumption in the City of Bristol,

Mass., which energy had been transported into the state from Connecticut. In the order dated May 28, 1947 the commission found that "it is extremely doubtful" that the commission could lawfully issue the original order in the light of the decision of the Supreme Court in the case referred to, because it purported to regulate the sale of the energy to ultimate consumers. The commission pointed out that the Federal Power Act "sprang in part from the desire of those seeking effective utility regulation to close the gap revealed by the *Attleboro* case. To that extent, the authority granted to this commission was designed to subserve its regulation of wholesale sales of electrical energy in interstate commerce *for re-sale*." And, of course, the same thing is true with reference to the Natural Gas Act because the same gap existed with reference to natural gas which existed with reference to electrical energy and it was to close that one gap that the jurisdiction of the Federal Power Commission was defined as it has been by statute.

ARGUMENT

The purpose of this brief and particularly of this argument is to invite the court's attention directly to certain positions taken by appellant in its brief herein. We respectfully submit that the opinion of the Indiana Supreme Court shows that it was written with the greatest care, that the court carefully considered all applicable authorities and correctly applied them to the facts in this case. Perhaps it would be presumptuous for the corporate appellees to think they could improve on that presentation and it is for this reason that we address ourselves particularly to certain points made in the appellant's brief and to the authorities relied on by the appellant.

APPELLANT'S DISCUSSION OF THE BARRETT, ATTLEBORO AND LANDON CASES

State of Missouri ex rel. Barrett v. Kansas Natural Gas Co. (1924), 265 U. S. 298 has been cited and referred to twenty times in appellant's brief. Appellant has cited and referred to *Public Utilities Commission v. Attleboro Steam & Electric Co.* (1927), 273 U. S. 83 nine times. Both of these cases hold that the sale of interstate gas in the former, and electrical energy in the latter, for re-sale, are such an integral part of interstate commerce that, like transportation in interstate commerce, such business is not subject to state regulation. This has always been true, but such a holding has never been applied by the United States Supreme Court to sales to ultimate consumers. There is a difference between a business that *constitutes* interstate commerce and a business which, it may be assumed, *affects* interstate commerce. It was the holding in these two cases along with some other kindred cases that pointed up the necessity of giving Congress jurisdiction over sales for

re-sale in interstate commerce of both gas and electrical energy. There was no necessity for doing that in connection with the sale of these products to ultimate consumers. Regulation of these sales was always provided for in the police power of the state with reference to local matters until the Federal Government saw fit to intervene.

In the *Barrett* case, *supra*, which has been cited so many times by appellant and on which these corporate appellees have always relied because of what this court has said in explaining its holding in that sale for re-sale case, the court explained *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23 by stating at page 308:

"There is nothing in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, 64 L. Ed. 434, P. U. R. 1920E, 18, 40 Sup. Ct. Rep. 279, inconsistent with this view. There the Gas Company, a Pennsylvania corporation, transmitted gas from Pennsylvania into New York, and sold it directly to the consumers. The service to the consumers, which was the thing for which the regulated charge was made, was essentially local, and the decision rests upon this feature. Mr. Justice Day, in the course of the opinion, said: 'The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the state; nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers, who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.' "

In the instant case the gas after reaching Indiana is "sub-divided and sold at retail." Not only is the appellant sub-dividing and selling its gas at retail but it has declared its intention to continue to do this in every instance, and

in as many instances as, customers satisfactory to it can be found along its lines. In each case the gas is held in the state of consumption and can never find its way back into the high pressure mains which brought it into the state but will be held in the lateral lines until customers need it and use it, in other words, demand it. The appellant holds its gas in Indiana after it takes it from the transmission mains subject to the demands of local consumers, whether its lateral mains are few or many. The gas is held on demand subject, of course, to regulation from the Federal Power Commission with respect to its transmission or its sale for re-sale in interstate commerce.

In *Federal Power Commission v. Hope Natural Gas Co.* (1944), 320 U. S. 591, the court discussed what was involved in the *Barrett* and *Attleboro* cases. At page 609 it was said:

"We pointed out in *Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, 314 U. S. 498, 506, 86 L. ed. 371, 376, 62 S. Ct. 384, that the purpose of the Natural Gas Act was to provide, 'through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation.' As stated in the House Report the 'basic purpose' of this legislation was 'to occupy' the field in which such cases as *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298, 68 L. Ed. 1027, 44 S. Ct. 544 and *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83, 71 L. Ed. 549, 47 S. Ct. 294, had held the States might not act. H. Rep. No. 709, 75th Cong. 1st Sess., p. 2. In accomplishing that purpose the bill was designed to take 'no authority from State commissions' and was 'so drawn as to complement and in no manner usurp State regulatory authority.' Id. p. 2. And the Federal Power

Commission was given no authority over the 'production or gathering of natural gas.'

"The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. Due to the hiatus in regulation which resulted from the *Kansas Natural Gas Co.* case and related decisions state commissions found it difficult or impossible to discover what it cost interstate pipe-line companies to deliver gas within the consuming states; and thus they were thwarted in local regulation. H. Rep. No. 709, supra, p. 3. Moreover, the investigations of the Federal Trade Commission had disclosed that the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe line transportation, had been acquired by a handful of holding companies. State commissions, independent producers, and communities having or seeking the service were growing quite helpless against these combinations. These were the types of problems with which those participating in the hearings were preoccupied. Congress addressed itself to those specific evils."

In *Harvard Law Review* for September, 1945, Vol. LVIII, No. 7, p. 1072 there is a philosophical discussion of the whole principle involved in this action. There the author said at page 1082:

"the court (U. S. Supreme Court) has forbidden taxation or price fixing of the first sale if it is to a distributing company for resale, even though the pressure of gas is reduced before entrance into the purchaser's pipes."

In the note in support of this statement the author cites *Missouri ex rel. Barrett v. Kansas Natural Gas Company* (1924), 265 U. S. 298; *State Tax Commission v. Interstate Natural Gas Co.* (1931), 284 U. S. 41. He says that the *Interstate Natural Gas* case

"condemned a privilege tax although the pressure was reduced before sale to distributors. Somewhat, similarly, reduction of the pressure before delivery to distributing companies was held not to put the company into local commerce in *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 398 (1942), note 30 supra. In 314 U. S. at 506, n. i., Mr. Chief Justice Stone quotes from the committee report on the proposed federal legislation, from which it is clear that the lines drawn by the Committee and assumed by it to be the lines drawn in Supreme Court decisions were between sales to consumers and sales for re-sale, with no mention of any significance to be attached to reduction of pressure."

At page 1084 of the Harvard Law Review article Prof. Powell says:

"So the court has been pretty consistent in finding localism in the consuming end"

of the transportation in interstate commerce of gas or electricity and its sale to ultimate consumers.

And finally at page 1089 Prof. Powell says that undoubtedly the state where the gas is sold to the ultimate consumer has jurisdiction over such sales

"because both rates and receipts are local and not interstate."

The above article by a scholar who is disinterested shows convincingly that Panhandle's position is not only unsupported by authority but by the logic of the situation as well.

We may be pardoned for referring to another discussion of the *Barrett* case by an impartial observer. In the note in 82 L. Ed. at page 1182 the author states:

"Likewise, a state may regulate the rates to be charged to consumers by a pipe line company bringing gas from without the state and selling it directly to

the consumers from its interstate main, and this whether the local distribution be made by the pipe line transporting company, or by an independent distributing company. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance. *Missouri ex rel. Barrett v. Kansas Natural Gas Co.* (U. S.) *supra*."

Referring to *Public Utilities Commission v. Attleboro Steam & Electric Co.* (1927), 273 U. S. 83, that case was also explained in the quotation from the *Federal Power Commission v. Hope Natural Gas Co.* set forth above in connection with the discussion of the *Barrett* case.

It may be assumed the Federal Power Commission understood the holding in the *Attleboro* case to be as contended for by these appellees because of the language quoted in Point No. 26 of the summary of argument herein.

Connecticut Light & Power Company v. Federal Power Commission (1945), 324 U. S. 515 explains particularly the *Attleboro* case and the reason why Congress defined the jurisdiction of the Federal Power Commission as it did. The court in that case made the following statement: (p. 526)

"In reporting a revised bill to the Senate the Committee on Interstate Commerce said, 'Subsection (a) * * * declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory powers; but not to impair or diminish the powers of any State Commission.'

"The Report of the House Committee on Interstate and Foreign Commerce in presenting the amended bill called attention to *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83, holding that rates charged in interstate wholesale transactions may not be regulated constitutionally by the states,

and expressed the purpose to give federal jurisdiction to regulate rates of wholesale transactions, but not to give jurisdiction over local rates. It said:

"The bill takes no authority from State commissions and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges.

"* * * The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority and contain throughout directions to the Federal Power Commission to receive and consider the views of State commissions. Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill."

"Subsection (b) confers jurisdiction upon the Commission over the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce, but does not apply to any other sale of electric energy or deprive a State of any lawful authority now exercised over the exportation of hydroelectric energy transmitted out of the State. As in the Senate bill no jurisdiction is given over local distribution of electric energy, and the authority of States to fix local rates is not disturbed even in those cases where the energy is brought in from another State."

It may be pointed out that the Supreme Court in the above case attached importance to the report of a House Committee when that report was not only accepted by the House of Representatives but the bill was passed by the Senate as well and it was a report that had to do with the actual enactment of one of the very laws involved in the instant proceeding and it may be assumed that the members of the Congress knew what they intended to accomplish when they were defining the powers of the Federal Power Commission a decade ago.

In this connection it may be pointed out that appellant makes frequent reference to House Report No. 800 in the 80th Congress, First Session (pages 22, 51, 61, 62, 65 of appellant's brief). This report and the Congressional Record which contains a discussion of the report, and the bill which it concerned (H. R. 4051 Congressional Record July 11, 1947, p. 8907 *et seq.*) show that they were sponsored by Representative Ross Rizley of Guymon, Oklahoma, of the firm of Rizley & Tryon and later of Rizley, Tryon & Sweet. This firm began listing the appellant in this case among its representative clients in the 1944 edition of a standard and recognized legal publication, i. e., Martindale-Hubbell Law Directory. This is not mentioned to question Mr. Rizley's employment but only to suggest that his observations may not be entitled to the same weight as they would have been if he had not been so employed. (See page 1377 of the 1943 edition, page 1407 of the 1944 edition and page 4802 of the 1947 edition of Martindale-Hubbell Law Directory.) Furthermore, what Mr. Rizley expressed in his report or in his bill of 1947 which has not become a law, is immaterial in connection with the interpretation of a bill which passed both Houses of Congress and was signed by the President of the United States, thus becoming the authoritative expression of the legislative branch of the government nearly a decade ago, and which has been interpreted on numerous occasions by the Supreme Court of the United States.

Of course, wherever the word "wholesale" is used in considering the jurisdiction of the Federal Power Commission it always means sale for re-sale because the Federal Power Act expressly so provides (Title 16, Section 824 (d) U. S. C. A.; C. 285, Sec. 201, Added Aug. 26, 1935, C. 687, Title II, Sec. 213, 49 Stat. 847). And the Federal Natural Gas Act only treats of two classes of sales, namely, sales

for re-sale which must include wholesale sales regardless of the size of the sale or to whom it is made, and other sales (Title 15, Sec. 717 (b) U. S. C. A.; C. 556, Sec. 1, 52 Stat. 821).

The case of *Public Utilities Commission v. Landon* is cited and referred to five times by appellant in its brief. It was a gas case. The *Barrett* case, *supra*, also explains the *Landon* case.

The court concluded its discussion of the *Pennsylvania Gas* case by saying:

"The commodity, after reaching the point of distribution in New York, was subdivided and sold at retail." (p. 309.)

which is what the appellant is doing in Indiana and is purposing doing to an ever larger extent. Then the court said of the *Landon* case at page 309:

"The *Landon* Case, so far as this phase is concerned, differs only in the fact that the process of division and sale to consumers was carried on, not by the Supply Company, but by independent distributing companies.

"In both cases the things done were local, and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the *Landon* Case. *The business of supplying, on demand local consumers, is a local business, even though the gas be brought from another state, and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance. But here the sale of gas is in wholesale quantities, not to consumers, but to distributing companies for re-sale to consumers in numerous cities and communities in different states.*"

Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23 also discusses the *Landon* case and various other cases in the following language:

"We think that the transmission and sale of natural gas produced in one state, transported by means of pipe lines, and directly furnished to consumers in another state, is interstate commerce within the principles of the cases already determined by this court. (Citing several cases and authorities.)"

"This case differs from *Public Utilities Commission v. Landon*, 249 U. S. 236, 63 L. ed. 577, P. U. R. 1919C, 834, 39 Sup. Ct. Rep. 268, wherein we dealt with the piping of natural gas from one state to another, and its sale to independent local gas companies in the receiving state, and held that the retailing of gas by the local companies to their consumers was intrastate commerce, and not a continuation of interstate commerce although the mains of the local companies receiving and distributing the gas to local consumers were connected permanently with those of the transmitting company. Under the circumstances set forth in that case we held that the interstate movement ended when the gas ~~passed~~ into the local mains; that the rates to be charged by the local companies had but an indirect effect upon interstate commerce, and, therefore, the matter was subject to local regulation."

So in the *Barrett*, *Attleboro* and *Landon* cases the court, of course, held that sales for re-sale were not subject to state regulation but sales to local consumers to satisfy the demand for the interstate product were subject to state regulation and it was immaterial so far as any of these cases show, how many local consumers were served or were to be served by the utility or how many pipes were to be extended from the high pressure gas transmission line or from the high voltage electric transmission line. Likewise, under both the Natural Gas Act and the Federal Power

Act the business of distributing the gas or electrical energy and the business of selling it to ultimate consumers are not to be regulated by the Federal Power Commission. The appellant seeks to admit that the distribution of the gas or the electrical energy is to be regulated by the state commissions and there is no reason whatever for thinking that Congress intended or anyone else intended that the process of selling the product to the ultimate consumer (which Congress has defined as a process distinct from distributing it or transmitting it or selling it for re-sale) should not also be regulated by the state commission. That is where the duty to regulate it would naturally be found until Congress sees fit to change it. It is submitted that it is difficult to understand why appellant has so frequently cited the *Barrett*, *Attleboro* and *Landon* cases where the Supreme Court has so clearly stated that they were decided as they were because they were instances of sale for re-sale and not sales to ultimate consumers, in other words, were not sales for use at the burner tips. It is these cases which, more than any other consideration, convinced Congress that this lone gap in the regulation of the electric and natural gas industries should be bridged and caused the Supreme Court to say in *Public Utilities Commission v. United Fuel Gas Co.* (1943), 317 U. S. 456 at page 467:

"It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H.

Rep. No. 2651, 74th Cong. 2d Sess. pp. 1-3; H. Rep. No. 709, 75th Cong. 1st Sess. pp. 1-4; Sen. Rep. No. 1162, 75th Cong. 1st Sess."

OTHER CASES CITED FREQUENTLY BY APPELLANT

Appellant cites six times *Pennsylvania v. West Virginia* (1923), 262 U. S. 553. That case held that natural gas is a lawful article of commerce which, of course, is true and it also held that a state where gas is gathered could not prevent a company from transmitting it to another state. The transmission of the gas is the very act of interstate commerce and a state could not regulate it, any more than it could regulate the sale of the article for re-sale but that does not even suggest that the state where it is sold for use at the burner tips could not, under its retained police power, regulate the distribution of the gas or its use at the burner tips even before the Federal Power Commission was given the jurisdiction it now possesses. If the cited case arose now the same result would be reached so far as the power of the state to regulate the shipment of the gas from one state to another is concerned because the transmission of the gas could not be regulated by the state. That function is now performed by the Federal Power Commission. In principle the case is the same as the *Barrett*, *Attleboro* and *Landon* cases.

Appellant cites and refers four times to *Arkansas Louisiana Gas Co. v. Department of Public Utilities* (1938); 304 U. S. 61. In that case the gas company which transported its gas in interstate commerce operated locally in many instances in Arkansas. The state commission ordered it to file reports, etc., involving all of its Arkansas operations. After discussing the various features of the company's business in Arkansas, the Supreme Court at p. 63 said "In

case the Department undertakes by some future action to impose what may be deemed unreasonable restraint or burden upon appellant's interstate business through rate regulation or otherwise that may be contested." From that mere statement Panhandle cites the case as an authority holding or suggesting that *any* effort of the state commission to impose a regulation affecting the interstate features of the business would necessarily be void even though the order did not concern transportation in interstate commerce or sale for re-sale; when the fact is that all the Supreme Court was suggesting was that if the state commission should later attempt to impose any *UNREASONABLE* restraint or burden on the company's interstate business through rate regulation or otherwise, that matter could be contested. Of course, that is true. Nobody suggests that any commission, state or federal, can impose any unreasonable restraint or burden on any kind of commerce—whether it be intrastate or interstate—and if such a thing is attempted the effort can be contested.

At page 36 appellant cites *Roland Electric Company v. Walling* (1946), 326 U. S. 657, 673, as holding that the term "wholesale" sales means sales "in wholesale quantities" and includes sales to industries for their own consumption as well as sales to distributing companies. From that it argues that since the sale to distributing companies is not subject to local regulation the sale to industrial companies should not be. But the point is that the Federal Natural Gas Act and the Federal Power Act cited *supra*, recognize only two classes of sales—sales for re-sale and all other sales. Certainly sales to industrial consumers for their own use at their burner tips are not wholesale sales under that definition. How large would a sale have to be before appellant would think that a sale should be treated as a sale for re-sale and not a sale for use at the burner tips? Congress did not purport to provide that one constitutional principle

should apply to the big fellow and another constitutional principle should apply to the little fellow.

Appellant cites and refers four times to *Walling v. Jacksonville Paper Co.* (1943), 317 U. S. 564 in which a distributor obtained in interstate commerce paper products to be sold to specified customers in a particular state and the sale was held to be "in commerce," so as to render the Fair Labor Standards Act applicable to the distributor's employees engaged in local distribution to consumers. This principle is not questioned. The court held the Federal Act was designed to apply to the workmen involved. In the instant case the federal statute provides, and the cases herein discussed hold, that the federal authority *shall not* apply to the circumstances under consideration.

Appellant cites six times *Southern Pac. R. Co. v. Arizona* (1945), 325 U. S. 761 and *Morgan v. Virginia* (1946), 328 U. S. 373 four times. Both of these cases involve only the very process of transportation of the product from one state to another and, of course, that process is and always has been subject to federal control and has not been subject to state control and since the Federal Power Commission was created it has been in fact controlled by that commission.

Baldwin v. Seelig (1935), 294 U. S. 511 is frequently cited. In that case the New York statute provided minimum prices for milk to be paid to producers in states other than in New York. The purpose was to protect New York producers from having to compete with cheaper prices paid to producers in other states. The court held that New York could not prescribe what should be paid to producers in other states. This would seem to be obvious but it is not a holding that New York could not regulate the rates

a public utility company might charge for service in New York to New York ultimate consumers.

Sionx City, Iowa v. Missouri Valley Pipe Line Co. (1931), 46 F. (2d) 819 is extensively quoted by appellant. Here the District Court of the Northern District for the Western Division in the State of Iowa held the interstate transporter of the gas occupied no public highway but certain private rights-of-way. It served gas only to certain privately owned packing companies and did not offer to sell and did not serve any other consumer. The selling company did not, as Panhandle has done, ~~accept~~ ^{expect} to serve or offer to serve consumers of natural gas generally so long as their business was large enough to make it interesting and sufficiently profitable to the selling company to come within the selling company's arbitrarily fixed standards. The transporting company's clientele was frozen from the beginning and it was so recognized by every one and these facts caused the court to hold that the transaction was not a public utility activity and therefore not subject to state regulation. The facts in the Iowa case are in direct opposition to the facts in the instant case.

Columbia Gas & Electric Corporation v. U. S. (C. C. A. 6, 1945), 151 F. (2d) 461 is cited several times. The court decided that certain creditors of a company in process of reorganization were entitled to preference over certain other creditors. The court did not consider whether a gas company could decide that it would only serve gas to selected customers and thereby avoid regulation either by the state or federal government. That matter was in no way involved in the decision of the case.

APPELLANT'S BUSINESS AND PROPOSED BUSINESS IN INDIANA IS A PUBLIC UTILITY BUSINESS AND SUBJECT TO REGULATION BY SOME PUBLIC AUTHORITY

Appellant's activities in Indiana surely come within the definition of a public utility which embraces every corporation that may own or operate *any* plant or equipment within the state for the production, transmission, delivery or furnishing of heat, light or power either directly or indirectly to or for the public. 54-105 Burns 1933.

So appellant's business is subject to regulation by the State Public Service Commission unless the commerce clause of the United States prevents, or unless Congress itself has asserted jurisdiction over sales other than sales for re-sale.

It seems to be admitted that the Federal Constitution permits the State Commission to exercise jurisdiction over the local distribution of gas or electrical energy even though such product has been brought directly from across state lines. Also it seems to be admitted that the statutes defining the power of the Federal Power Commission not only do not prevent but permit state regulation of the *distribution* of such gas or *electrical energy*. But it is contended that the Federal Constitution prevents the State Commission from regulating sales not for re-sale but to the ultimate consumer although the Federal Government has expressly refused to assume that burden; and although interstate gas or electrical energy may in principle be no more involved in the local sale to ultimate consumers than in the local distribution of the product; and although the process of local distribution and of sales other than sales for re-sale are referred to in the disjunctive in the Federal

statutes and treated as distinct processes but each subject to precisely the same statutory provisions. (U. S. C. A. Title 15, Sec. 717 (b); Title 16, Sec. 824 (b); Title 16, Sec. 824 (d).)

The quotation from *Industrial Gas Co. v. Public Utilities Commission of Ohio* (1939), 135 Oh. St. 408, 21 N. E. (2d) 166, in the Indiana Supreme Court Opinion at R. 212 shows that a corporation engaged in what the statute properly refers to as a public utility activity can not pick and choose its customers but must serve all the public which applies for service on reasonable terms. The language in *United Fuel Gas Co. v. Railroad Commission* (1929), 278 U. S. 300, 309 is determinative of that proposition.

"The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. An important purpose of state supervision is to prevent such discriminations."

See also *New York ex rel. N. Y. & Q. Gas. Co. v. McCall* (1917), 245 U. S. 345, 351.

Chapter 53 Acts 1945, p. 110 (Sec. 54-601a Burns Supp.) requires that a "Necessity Certificate" must be procured in Indiana before a gas utility can serve as a public utility in rural areas already being served as set forth in said Chapter 53. Also Sections 54-601, 54-603 and 54-604 Burns 1933 require that a utility must secure an Indeterminate Permit, or Certificate of Public Convenience and Necessity from the State Commission before it can compete with another utility operating under an Indeterminate Permit. Does appellant contend (and their position inevitably leads to the

contention) that the appellant has a right to go into any city in Indiana where a privately owned or municipally owned utility is rendering public service and take the cream of the business in that city simply because appellant brings its product from across state lines? Indiana does not lose its power to protect its citizens by the reasonable exercise of its police power merely because the appellant sees fit to transact business in several states or bring something into Indiana and sell it here to ultimate consumers. *Hooperston Canning Co. v. Cullen* (1943), 318 U. S. 313, 321. It is impossible to over estimate the consequences such a principle if given currency would bring not only to privately owned or municipally owned utilities in the state but to the whole theory of local self government.

It is submitted that the Federal Government has wisely left it to the State Commissions to protect the public locally against possible unfair treatment by public utilities. The distribution and sale of the gas locally is not transportation nor does it touch the state and its people so lightly that reasonable local regulation is inappropriate or interferes unconstitutionally with the commerce of other states. So long as the requirement is imposed reasonably without discrimination it is proper until the Federal Government intervenes. *Robertson v. California* (1946), 328 U. S. 440, 458.

But the point now is the Commission Order in question does not require that, at this time, appellant get a Necessity Certificate or a Certificate of Public Convenience and Necessity. The Commission ordered the appellant to file its rates, rules and regulations and make annual reports in addition to giving certain information on which further orders might be issued. These orders are just the sort of requirements that are made of every other utility in Indiana. It does not purport to go all the way at this time. Whether

a Certificate of Public Convenience and Necessity will be required is yet to be determined; and until it is known what other orders will be issued it can not be known whether they will conflict with the Federal Constitution or Statutes. *Rice v. Board of Trade*, 91 L. Ed. (13 Adv. Op.) 1058; 1062. (Official opinion not yet available.)

B

APPELLANT'S SALES TO ULTIMATE CONSUMERS
IN INDIANA ARE SUBJECT TO REGULATION
BY THE INDIANA COMMISSION BECAUSE
CONGRESS HAS NOT AUTHORIZED
THE FEDERAL POWER COMMISSION
TO ASSUME THE BURDEN

One of the landmarks of our law is *Simpson v. Shepard*, (Minnesota Rate Cases) 230 U. S. 352. It holds that many activities affect interstate commerce but are nevertheless subject to state regulation. We would not set forth extensive quotations from this case but at page 402 the court said:

"Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; * * * Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress

has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal Power."

Illinois Natural Gas Company v. Central Illinois Public Service Company (1942), 314 U. S. 498 is a particularly important case. It is respectfully suggested that it is decisive of the questions involved herein. It explains the *Landon, Barrett and East Ohio Gas Company* cases previously referred to herein. The Indiana Supreme Court quotes from this case at record 209. At page 505 of the Supreme Court Report it is said:

"In other cases the Court, in determining the validity of state regulations, has been less concerned to find a point in time and space where the interstate commerce in gas ends and intrastate commerce begins, and has looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce." (Authorities.)

Pennsylvania Gas Co. v. Public Serv. Commission (1920), 252 U. S. 23, has heretofore been discussed in some detail. It is a leading case and has caused appellant much concern in these proceedings. In that case interstate gas was sold to the ultimate consumer. There was no evidence of how many reduced pressure pipe lines were used or how many ultimate consumers were served by the Pennsylvania Company in New York. The court holds (p. 31) that such service "while a part of an interstate transmission, is local in its nature. * * * This local service is not of that character which requires general and uniform regulation of rates by congressional action; * * *. It may be conceded that the local rates may affect the interstate commerce of the company. But this fact does not prevent the state from making local regulations of a reasonable character."

The *Pennsylvania* case was before Justice Cardoza on its way to the Supreme Court. In *Pennsylvania Gas Co.* (1919), 225 N. Y. 397, P. U. R. 1919C 663, 122 N. E. 260 at pages 262 and 263 Justice Cardoza gave in the most forceful way, the reason why consumption or the sale to ultimate consumers is subject to state regulation until the Federal Government enters the field, while sales to distributing companies and transportation in interstate commerce are national in character and must be regulated nationally if they are to be regulated at all. Accordingly this case helped to point up the necessity for the creation of the Federal Power Commission with the jurisdiction it now has and the Supreme Court accepted the reasoning of Justice Cardoza. (252 U. S. 23, p. 31.)

In *Southern Natural Gas Corporation v. Alabama* (1937), 301 U. S. 148, the utility company sold interstate gas to one industrial ultimate consumer in Alabama (the other sales in Alabama were to three distributing companies and obviously were not local and not subject to state regulation or taxation). The sales to the one local industrial ultimate consumer were held to constitute local business and to be subject to state regulation and taxation so that a franchise tax could be imposed on the importer and must be paid as a condition precedent to selling the interstate product to one local industrial ultimate consumer. Said the court at page 155:

"We perceive no essential distinction in law between the establishment of such a local activity to meet the needs of consumers in industrial plants and the service to consumers in the municipalities which was found in the *East Ohio Gas Co.* case to constitute an intrastate business."

The *East Ohio Gas Co. v. Tax Commission* (1931), 283 U. S. 465 declared that the sale of interstate gas to the

ultimate consumers in that case was intrastate commerce and was subject to local taxation. It is an important case in the development of the principles for which we contend. If the franchise tax the State of Alabama imposed in the *Southern Natural Gas Corporation* case and the excise tax the State of Ohio imposed in the *East Ohio Gas* case were held to be legal, certainly a local police regulation of the kind under consideration in the case at bar would *a fortiori* be proper. *In re Freeman v. Hewit*, 91 L. ed. (No. 3, Adv. Op.) 205 at page 208. (Official opinion not yet available.)

We would again emphasize that the effort of appellant to place sales to domestic or commercial ultimate consumers in another and distinct category finds no justification either on principle or in the statutes or the decided cases. In *Colorado Interstate Gas Co. v. Federal Power Commission* (1945), 324 U. S. 581, 596, the court said:

“Industrial consumers are as much a part of the ‘public’ as domestic users and other commercial users. And distribution to one is as ultimate as the distribution to the others.”

We also cite *State v. Prudential Insurance Co.* (Ind. Dec. 21, 1945), 64 N. E. (Adv. Op.) (2d) 150 which is not yet officially reported. This case was later affirmed in the United States Supreme Court. *Prudential Insurance Co. of America v. State of Indiana* (1946), 328 U. S. 823. At page 151 the Indiana Court quoted as being decisive of the question there presented the opinion of this court in *United States v. Southeastern Underwriters Association*, 322 U. S. 533. The Indiana Court italicized the following portion of this court’s opinion in the *Southeastern Underwriters Association* case:

“It is settled that, for constitutional purposes, certain activities of a business may be intrastate and

therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why in the continued absence of conflicting Congressional action the state regulatory and tax laws should be declared valid."

This court declared the same principles in *Prudential Insurance Co. v. Benjamin* (1946), 328 U. S. 408, a tax case, and in *Robertson v. California* (1946), 328 U. S. 440 which upheld a California law regulating the transaction of interstate insurance business, in California and in which the Supreme Court said (p. 461) it would have reached the same result if the McCarren Act had not been passed.

CONCLUSION

We respectfully submit that the statement of this court in *Connecticut Light & Power Company v. Federal Power Commission* (1945), 324 U. S. 515 at page 530 fully applies to the circumstances in the case at bar and clearly indicates the result that should be reached. There this court said:

"But state lines and boundaries cut across and subdivide what scientifically or economically viewed may be a single enterprise. Congress is acutely aware of

the existence and vitality of these state governments. It sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a Federal plan is thereby sacrificed. Congress may think it expedient to avoid clashes between state and Federal officials in administering an act such as we have here. Conflicts which lead state officials to stand shoulder to shoulder with private corporations making common cause of resistance to Federal authority may be thought to be prejudicial to the ends sought by an act and regulation more likely to be successful, even though more limited, if it has local support. Congress may think complete centralization of control of the electric industry likely to overtax administrative capacity of a Federal commission. It may, too, think it wise to keep the hand of state regulatory bodies in this business, for the 'insulated chambers of the states' are still laboratories where many lessons in regulation may be learned by trial and error on a small scale without involving a whole national industry in every experiment."

We see no escape from the conclusion that the completely selfish interpretation given by Panhandle to our State and Federal laws providing for the regulation of the different phases of the natural gas and electrical energy industries finds no support in any of the decided cases or in any recognized principles of law applicable to the situation. We again say the undisputed facts in this case show that continued efficient service to domestic, commercial and small industrial users of natural gas and ultimately to large users of natural gas as well, in Indiana and all the other states, will be placed in jeopardy if Panhandle is permitted to pick and choose its customers and to serve or refuse to serve those it pleases without regulation from any source. If this can be done as to interstate gas it can be done as to interstate electrical energy and thus state regulation of all

such utility service is placed in jeopardy whether it be in cities and towns or in rural areas.

If Panhandle's position is correct, therefore, all distributing companies and all municipalities engaged in the gas or electric business, in their sales to ultimate consumers, are subject to unbridled competition from these transporting companies whose sales of gas or electrical energy for re-sale would alone be subject to any regulation and that regulation would have to be provided by the Federal Power Commission. It is only necessary to point to the effect of accepting Panhandle's startling position to realize how revolutionary this contention is.

We find no support in the evidence or in the law for appellant's position in this appeal and respectfully urge that the decision of the Indiana Supreme Court be affirmed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1947

VANHANDLE EASTERN PIPE LINE CO.,

Appellant,

THE PUBLIC SERVICE COMMISSION OF
INDIANA, et al

Appellees.

Case No. 69

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

**BRIEF FOR APPELLEE, PUBLIC
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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	3
Additional Statement of The Case	3
Summary of Argument	11
Argument	17
I. Scope Of The Commission's Order	17
II. Validity of Commission's Order As Regulation of Rates and Service	19
A. Approach To the Question	19
B. Principles To Be Applied	24
C. Application Of Principles To This Case	25
D. Principles Applied In Gas Company Deci- sions	29
E. Natural Gas Act Supports Commission's Order	38
F. Panhandle as a Public Utility	49
G. Commerce Clause Of Its Own Force and Need for National Uniformity	56
H. Conclusion	66

TABLE OF AUTHORITIES

CASES

	Page
Arkansas Gas Co. v. Department (1938), 304 U.S. 61, 82 L. Ed. 1149	3, 14, 18, 66
Canadian River Gas Co. v. Federal Power Commis- sion (1945), 324 U.S. 581, 89 L. Ed. 1206.....	48
Champlin Refining Co. v. United States (1946), 91 L. Ed. (Adv. Op.) 9, 12.....	19, 64
Colorado Interstate Gas Co. v. Federal Power Com- mission (1944), 324 U.S. 581, 89 L. Ed. 1206.....	40
East Ohio Gas Co. v. Tax Commission (1931), 283 U.S. 465, 75 L. Ed. 1171.....	34, 37
Federal Power Commission v. Hope Natural Gas Co. (1943), 320 U.S. 591, 88 L. Ed. 333.....	40
Freeman v. Hewitt (1946), 329 U. S. 249, 91 L. Ed. (Adv. Op.) 205.....	19, 20, 37, 56
Illinois Natural Gas Co. v. Central Illinois Public Service Co. (1941), 314 U.S. 498, 86 L. Ed. 371	23, 33, 40, 41
Industrial Gas Co. v. Public Utilities Comm. of Ohio (1939), 135 Ohio St. 408, 21 N.E. (2d) 166, 168.....	54
Interstate Natural Gas Co. v. Federal Power Commis- sion (1947), 91 L. Ed. (Adv. Op.) 1355.....	42, 48
Interstate Natural Gas Co. v. La. Pub. Serv. Comm. (E. D. La.) 34F. Supp. 980	66
Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 57 L. Ed. 511.....	21

Mississippi River Fuel Corp. v. Smith (1942), 350 Mo. 1, 164 S.W. (2d) 370.....	66
Missouri ex rel. Bartlett v. Kansas Natural Gas Co. (1924), 265 U. S. 298, 68 L. Ed. 1027.....	32, 39, 59
Morgan v. Virginia, 328 U.S. 373, 90 L. Ed. 1317.....	20, 64
Munn v. Illinois (1876), 94 U.S. 113, 24 L. Ed. 77.....	52
Natural Gas Pipe Line Company v. Slattery (1937), 302 U.S. 300, 82 L. Ed. 276.....	3
Orndoff v. Public Utilities Comm. of Ohio (1939), 135 Ohio St. 438, 21 N.E. (2d) 334.....	55
Pennsylvania Gas Company v. Public Service Commission (1920), 252 U.S. 23, 64 L. Ed. 434.....	30, 32, 33, 34, 35, 36, 37, 39, 60, 61, 64
Pipe Line Cases (1914), 234 U.S. 548, 58 L. Ed. 1459....	52
Producers Transportation Co. v. U. S. R. R. Commission, 251 U.S. 228, 64 L. Ed. 239.....	50
Prudential Ins. Co. v. Benjamin (1945), 328 U.S. 408, 90 L. Ed. 1342.....	20, 23, 57
Public Service Commission v. Attleboro Steam & Elec. Co. (1927), 273 U.S. 83, 71 L. Ed. 549.....	39, 59, 60
Public Utilities Commission v. Landon (1919), 249 U.S. 236, 63 L. Ed. 577.....	30, 32, 33, 36, 39
Public Utilities Commission v. United Fuel Gas Co., 317 U.S. 456, 87 L. Ed. 396.....	28, 40
Railroad Commission of Texas v. Pullman Co. (1940), 312 U.S. 496, 85 L. Ed. 971.....	52
Rice v. Board of Trade (1947), 91 L. Ed. (Adv. Op.) 1058	18, 44, 64
Robertson v. People of State of California, 328 U.S. 440, 90 L. Ed. 1366.....	57

	Page
<i>Sioux City v. Missouri Valley Pipe Line Co.</i> (N.D. Ia. 1931), 46 F. (2d) 819.....	49, 65
<i>South Carolina Highway Dept. v. Barnwell Bros.</i> (1938), 303 U.S. 177, 82 L. Ed. 734.....	22
<i>Southern Natural Gas Corp. v. Alabama</i> (1937), 301 U.S. 148, 81 L. Ed. 970.....	34, 37, 66
<i>Southern Pacific Co. v. Arizona</i> , 325 U.S. 761, 89 L. Ed. 1915.....	20, 64 ✓
<i>State ex rel. Cities Service Co. v. Public Service Commission</i> (1935), 337 Mo. 809, 85 S.W. ₂ (2d) 890.....	65
<i>Terminal Taxicab Co. v. Kutz</i> (1915), 241 U.S. 252, 60 L. Ed. 984.....	55
<i>Texas Co. v. Alton R. Co.</i> (1941), 117 F. (2d) 210, Cert. denied 313 U.S. 570, 85 L. Ed. 1529.....	52
<i>Townsend v. Yeomans</i> (1937), 301 U.S. 441, 81 L. Ed. 1210.....	52

COMMISSION CASES

<i>Re. Colorado Interstate Gas Co.</i> , P.U.R. 1933, E. 349..	65
<i>Re. Potter Development Co.</i> (1939), 32 P.U.R. (N.S.) 45	55

UNITED STATES CONSTITUTION

Article I, Sec. 8, ¶ 3.....	3, 19, 50
Fourteenth Amendment	49, 50

STATUTES

	Page
Indiana Acts 1933, c. 190, sec. 1, p. 928, Ind. Stat. Ann. (Burns 1933) sec. 54-105.....	13, 51
Indiana Acts 1945, c. 53, sec. 1, p. 110, Ind. Stat. Ann. (Burns 1945 Supp.) sec. 54-601A.....	13, 51
Judicial Code, sec. 237, 36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U.S.C.A. sec. 344(a).....	2
Natural Gas Act, 52 Stat., 821, et seq; 15 U.S.C.A. secs. 717 et seq.	12, 38, 39, 43, 50

MISCELLANEOUS

Hearings before Committee on Interstate and Foreign Commerce, House of Representatives on H.R. 2185, H.R. 2235, H.R. 2292 and H.R. 2956 (April- May 1947)	45, 46, 48
House of Representatives Report No. 709, 75th Cong., 1st Sess.	41
House of Representatives Report No. 800, 80th Cong., 1st Sess.	45, 46, 48, 49
Powell, Thomas Reid, Note, 58 Harvard Law Review 1072, 1082 (1945)	34, 61
Rules of Supreme Court of United States, No. 27 (4) ..	50

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1947

PANHANDLE EASTERN PIPE LINE CO.,

Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF
INDIANA, et al

Appellees.

Cause No. 69

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

**BRIEF FOR APPELLEE, PUBLIC
SERVICE COMMISSION OF INDIANA**

Opinions Below

The opinion of the Supreme Court of Indiana (R. 196) has not yet been officially reported but is unofficially reported at 71 N. E. (2d), 117. The opinion of the Circuit Court of Randolph County, Indiana is not reported but appears as Appendix B of Appellant's statement as to jurisdiction herein. The opinion of the Public Service Commission of Indiana of November 21, 1945 is not reported but is set out at pages 116 to 173 of the Record

in this case. Its first supplemental order and opinion appears at pages 180 to 191 of the Record in this case.

Jurisdiction

The judgment of the Supreme Court of Indiana was entered February 5, 1947 (R. 196). A petition for an appeal was filed March 25, 1947 and was allowed on the same day, (R. 228.).

The jurisdiction of this Court was invoked by Appellant under Section 237 of the Judicial Code, as amended (36 Stat. 1156; 43 Stat. 937; 45 Stat. 54; 28 U.S.C.A. 344 (a)).

Appellant contends that an order of the Public Service Commission of Indiana, dated November 21, 1945 (R. 171 to 173) as supplemented by an order dated April 9, 1946 (R. 190 to 191) is invalid as being repugnant to the Commerce Clause of the Constitution of the United States.

The order of the Commission dated November 21, 1945, by its express provisions ordered appellant (1) to file with the Bureau of Tariffs of the Commission its tariffs covering rates, rules and regulations appertaining to any and all sales of natural gas by Appellant *direct to ultimate consumers* within the State of Indiana; (2) file its annual reports for 1942 and all subsequent years so long as it distributes gas direct to any consumers in Indiana; and (3) file with the Commission copies of certain other reports and data. (R. 171-173)

The Appellee, The Public Service Commission of Indiana, filed in this Court its Statement Opposing Jurisdiction and Motion to Dismiss or Affirm on the ground that the validity of the order of the Commission in this case had been definitely settled by this Court in the cases of

Arkansas Gas Co. v. Department (1938) 304 U. S. 61, 82 L. Ed. 1149 and *Natural Gas Pipe Line Company v. Slattery* (1937) 302 U. S. 300, 82 L. Ed. 276.

However, this Court noted probable jurisdiction in the case on May 19, 1947. (R. 235)

Question Presented

The ultimate question to be decided by this Court is whether the requirements imposed upon Appellant by the order of the Public Service Commission of Indiana dated November 21, 1945 (R. 171 to 173) are invalid as being repugnant to Article 1, Section 8 (3) (Commerce Clause) of the Constitution of the United States.

Additional Statement of the Case

This case began on October 13, 1944 when the Public Service Commission of Indiana, after a summary investigation on its own motion, ordered a formal hearing to determine the extent and manner in which Appellant, Panhandle Eastern Pipe Line Company (hereafter referred to as Panhandle) was distributing natural gas as a public utility to ultimate consumers within the State of Indiana, and whether it was complying with the laws of Indiana in that regard. (R. 116 to 120)

The Commission recited that prior to this investigation it had never been supplied with information as to the activities of Panhandle within the State of Indiana. When the supplying of direct consumer gas service was commenced by Panhandle in Indiana it did not file, and has at no time since filed with the Commission any reports, tariffs or regulations. (R. 125)

Panhandle filed objections to the jurisdiction of the Commission (R. 120). Six local public utility distributing companies who were being supplied gas from Panhandle intervened.¹ (R. 121) Panhandle and the other parties in this case stipulated practically all of the facts before the Commission (R. 123) and based upon said stipulations and other evidence the Commission made its Findings of Facts. (R. 126 to 149).

It was further stipulated by Panhandle and the Appellees in this case that for this appeal the Findings of Facts of the Commission correctly summarized all of the evidence offered before the Commission (R. 231) except as to matters not included therein which are covered by other stipulations filed in these proceedings. (For other stipulations, see R. 35 to 116). At the hearing before the Commission, the following pertinent facts appeared which are recited in the Findings of Facts of the Commission, or appear in other parts of the record in this case.

Panhandle is a Delaware corporation organized in 1929. In 1930 it was admitted to do business in Indiana but this authority was revoked in 1933 because of its failure to file annual reports (R. 40). In 1935 Panhandle was again admitted to do business in Indiana as a foreign corporation. In its articles, it was authorized to engage in the business of transporting natural gas in, into, through and from the State of Indiana and any other State except Delaware; and of supplying gas to other corporations and persons engaged in the business of supplying gas to the public (R. 128).

¹Central Indiana Gas Company, Greenfield Gas Company, Inc., Kokomo Gas and Fuel Company, Northern Indiana Public Service Company, Public Service Company of Indiana and Southern Indiana Gas and Electric Company.

Panhandle was also authorized in its articles to produce, purchase, store and transmit gas and to sell or otherwise dispose of such gas to corporations and persons, and to acquire and sell all property in the State of Indiana necessary for carrying on its legitimate business. It was further recited in its articles that the business, above described, was for the purpose of interstate commerce only and not that of a public utility business in Indiana (R. 128). The certificate of admission issued in 1935 is still in force and effect. (R. 127)

Prior to 1931, Panhandle had constructed its main transmission line which extended about 1160 miles from the Amarillo Gas Field in the Texas Panhandle and the Hugoton Gas Field in southwestern Kansas through the states of Oklahoma, Kansas, Missouri and Illinois to a point near the Indiana-Illinois state line where it connected at Dana, Indiana, with a line subsequently acquired by Panhandle, running from Dana, Indiana, to Zionsville, Indiana, and from Zionsville, Indiana, to Detroit, Michigan. A branch of this line extended from Zionsville, Indiana, to Muncie, Indiana. All of these lines are presently being operated by Panhandle in Indiana and consist of 22 inch, 24 inch and 26 inch transmission mains, branch lines, dehydrated plants, gasoline plant compressor stations and related facilities incidental to the transmission and delivery of natural gas. (R. 126-127.)

In 1943 Panhandle constructed an additional line running from Liberal, Kansas, to a point 68.8 miles northeast of Zionsville, Indiana, and from a point near Edgerton, Indiana, to a point in Ohio. (R. 127.) The location of these main gas lines, their branches, laterals and related equip-

nient are shown on the map set forth in the Record at page 66.

The aforesaid gas transmission lines and other facilities were constructed or acquired by Panhandle for the purpose of transporting natural gas from the gas fields in Texas and Kansas to the intervening states, including Indiana, and selling such gas directly or indirectly to the public and Panhandle is now engaged, and it, or the companies which it has acquired in Indiana, have been continuously engaged in the furnishing of natural gas in the State of Indiana and elsewhere, directly or indirectly, to all types of consumers, residential, commercial and industrial. (R. 127.)

Approximately 950,000 consumers are supplied directly or indirectly with gas from the entire Panhandle system and Panhandle serves directly 194 residential consumers and 23 industrial consumers. (R. 131; 47.)

In Indiana Panhandle serves directly or indirectly more than 112,000 consumers. It serves directly 7 residential consumers (employees of Panhandle) and 2 large industrial consumers—Anchor-Hocking Glass Corporation at Winchester, Indiana (R. 131), and E. I. DuPont de Nemours at Fortville, Indiana (R. 46, 176).

Panhandle likewise furnishes gas in Indiana to 10 local public utility distributing corporations and 4 municipalities who, in turn, furnish this gas to 97,699 residential consumers, 5,122 commercial consumers and 252 large industrial consumers (R. 132 to 134.)²

²Six of these local distributing companies intervened in the proceedings before the Commission to prevent Panhandle from taking away their industrial consumers (R. 136) and appeared in both the Circuit Court of Randolph County, Indiana and the Supreme Court of Indiana to uphold the order of the Commission made in this case (R. 23; 196)

From the main transmission lines of Panhandle lateral or branch lines of varying sizes and lengths extend to interconnections with gas lines of these various public utility distributing companies or to the industrial consumers which Panhandle serves direct. (R. 41.) A description of such connections with a typical local public utility distributing company and with an industrial consumer served direct by Panhandle (Anchor-Hocking) is summarized in the opinion of the Supreme Court of Indiana (R. 196 to 197) and is shown in detail in the Record at pages 134 to 135.

Deliveries of natural gas by Panhandle directly to industrial consumers using large quantities of gas and to other gas public utility companies for resale to industrial consumers using large quantities of gas, are, in most instances, subject to curtailment, interruption or discontinuance in the event of an insufficiency in the supply of gas. (R. 134.) This is provided for in the individual contracts made by Panhandle with industrial consumers it serves direct and with local public utility distributing companies, and in the individual contracts made by such local public utility distributing companies with their industrial consumers to whom they furnish gas purchased from Panhandle (R. 45.) (Appellant's Br., p. 14.)

The problem of the necessity of curtailment is the same whether the gas is sold directly by Panhandle to an industrial consumer or to a local public utility distributing company for resale to such consumer and involves consideration of the same elements of pressure, temperature, mechanical conditions of equipment, time of year, time of week and wind velocity. (R. 175.)

In June, 1943, Panhandle informed Kokomo Gas & Fuel Company (an intervenor herein), a local public utility dis-

tributing company in Indiana furnishing gas purchased from Panhandle to Continental Steel Corporation, a large industrial consumer, that in the future it would be the purpose of Panhandle to make all contracts for supplying gas to large industrial consumers, like Continental Steel, direct with such companies thus taking such industrial customers away from the Kokomo company. (R. 136.)

At the same time Panhandle expressed this same intention and purpose to Northern Indiana Public Service Company, Central Indiana Gas Company and others (intervenor herein), all local public utility distributing companies in Indiana purchasing gas from Panhandle for resale to industrial consumers. (R. 136 to 143.)

This same intention and purpose was expressed by Panhandle through its President and Chairman of its Board to the effect that Panhandle was interested in securing directly the industrial customers now served by local public utility distributing companies because this was an unregulated transaction both as to the Federal Power Commission and the Public Service Commission of Indiana and that industrial rates would be established not by public regulation but on a competitive fuel basis. (R. 149.)

Panhandle seeks to sell directly any industrial plant using natural gas in quantities agreeable to Panhandle and not to sell the gas to a public utility distributing company for resale because it is the position of Panhandle that such business is beyond regulation by any regulatory body, thus enabling Panhandle to make as much money from the business as possible. (R. 149.)

If Panhandle carries through such a program and serves all industrial customers in Indiana directly, then the local

public utility distributing companies will be deprived of a total of 252 large industrial consumers in the State of Indiana. (R. 133.)

A compilation taken from the annual reports of the local gas public utilities operating in Indiana under the jurisdiction of the Public Service Commission of Indiana for 1943 shows that of the total gross revenues derived from the sales of gas 62.71% was derived from industrial sales and that industrial consumers represented only 2.8% of the total number of consumers (95% were domestic consumers and 3.76% were commercial consumers). (R. 143.)

If only 3 of the local public utility distributing companies involved were to lose all of the gas revenues classified as industrial sales by reason of Panhandle serving the same directly, it would mean a total loss in gross revenues in excess of four million dollars per year and said companies would only be able to dispense with less than 2% of their gas utility plant properties. (R. 144 to 147.)

The fact that these distributing companies served natural gas to all three classes of gas consumers, i. e., industrial, commercial and domestic, has made possible a high standard of service at lower rates to the consumers in each of the three classes than would have been possible if only one of the classes had been served. It has meant that the residential and commercial customers have had the benefit of natural gas which would have been denied them unless the distributing companies' business had included service to all three classes of consumers. The installation of facilities to serve industrial consumers has made possible the development of domestic uses, including cooking and water heating, the higher B.T.U. gas for house heating and the use of gas for commercial cooking purposes by restaurants,

hotels and others. All of these services under old methods were prohibitive in cost or the gas was not available in the quantities in which the customers wished to use it, due to the inadequacy of facilities and of the supply of gas. (R. 145.)

It was through the development by the distributing companies of the industrial business that they have been able to improve materially the over-all load factor of gas purchased. This has also enabled the distributing companies to spread their fixed costs, such as interest, taxes and depreciation, which are constant in every-day operation, over a larger number of units of service, which automatically has given the benefit of that condition and fact to each of the three classes of consumers and has made possible the development of rates for service which were attractive not only to one of the three classes but to each of them; all of which has had the effect of promoting greater public interest in the area served by these distributing companies in the use of natural gas and in advancing the public welfare in those areas. (R. 145-146.)

The sales in Indiana of gas by local public utility distributing companies to industrial consumers has long been and is now under the jurisdiction of the Public Service Commission of Indiana. (R. 143, 208.) Panhandle contends that once it starts serving such industrial consumers direct, such sales will not be under the jurisdiction of the Public Service Commission of Indiana or under the Federal Power Commission but that competition from other fuels will determine the rates and service for such sales. (R. 149.)

Based upon the foregoing facts, as recited in the Findings of Facts, the Public Service Commission of Indiana made its order of November 21, 1945, requiring Panhandle

to file with it the matters heretofore set forth in this brief at page 2.

Panhandle filed its complaint in the Circuit Court of Randolph County, Indiana, to set aside and enjoin the aforesaid order of the Commission on the ground that it was repugnant to the Commerce Clause of the Constitution of the United States (R. 1 to 21). After the case was tried by the Randolph Circuit Court, Panhandle filed with the Commission a conditional offer agreeing to furnish the information required by the order of the Commission of November 21, 1945, if the Commission would modify that order so as to state unequivocally that the order involved no assertion of jurisdiction or authority by the Commission over the business of Panhandle in selling and delivering gas direct to industrial consumers in Indiana. (R. 179.)

The Commission rejected this conditional offer and declared that the information, if furnished, would be deemed to be on file for use by the Commission for all purposes and uses permitted by the Public Service Commission Act of Indiana (R. 190). These additional facts were brought into the record before the Circuit Court of Randolph County, Indiana (R. 25) which Court on May 11, 1946, entered a judgment setting aside the order of the Commission (R. 30). This judgment was in turn reversed by the Supreme Court of Indiana on February 5, 1947, with instructions to the Randolph Circuit Court to enter judgment denying the relief sought by Panhandle (R. 213).

Pertinent Statutes Involved

All parties in this case agree that Panhandle is subject to the provisions of the Federal Natural Gas Act and to the

jurisdiction of the Federal Power Commission in its sales to public utility companies in Indiana, which resell to ultimate consumers. Section 1 (b) of the Act (52 Stat. 821; 15 U. S. C. A. 717 (b)) provides:

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Based upon the above wording of the Act, all parties also agree that sales of gas by Panhandle direct to industrial consumers are excluded from the provisions of said Act and are not subject to the jurisdiction of the Federal Power Commission. Panhandle claims that its direct sales to industrial consumers were excluded because Congress did not deem that Federal regulation was necessary and that state regulation was precluded by the Commerce Clause of its own force (Appellant's brief, pp. 57, 63).

Appellees contend that direct sales to industrial consumers were excluded from the Act because Congress intended them to be regulated by the several states as will be demonstrated in the argument following. In this connection, Section 17p (b) and (c) of the Federal Natural Gas Act (52 Stat. 831; 15 U. S. C. A. 717 p) provides in part as follows:

"(b) The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regu-

lations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

“(c) The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. . . .”

Panhandle claims that it is not subject to the provisions of the Public Service Commission Act of Indiana, regulating public utilities because it is not a “public utility” as defined therein. Appellees claim that it is. Section 54-105, Burns 1933, defines, in part, a public utility to be:

“... every corporation . . . , that now or hereafter may own, operate or control any . . . plant or equipment . . . for the . . . transmission, delivery or furnishing of heat, light, water or power . . . either directly or indirectly to or for the public”

Section 54-601 A, Burns 1945 Supp. (Chapter 53 of Acts of General Assembly of Indiana of 1945) defined in part “gas utility” to be:

“... any public utility selling or proposing to sell or furnish gas directly to any consumer or consumers, within the State of Indiana for his, its or their domestic, commercial or industrial use. . . .”

The Supreme Court of Indiana construed these statutes to include the activities of Panhandle in selling direct to

industrial consumers to be within the meaning of the terms "public utility" and "gas utility" (R. 211-213) and such construction is binding upon this Court, as will hereafter be demonstrated in the Argument.

There is no dispute between the parties in this case that the sales of gas by local public utility distributing companies in Indiana to industrial consumers is subject to the Public Service Commission Law of Indiana and to regulation by the Public Service Commission. (R. 208.)

SUMMARY OF ARGUMENT

(1) The order of the Public Service Commission of Indiana attacked in this case did not by its provisions regulate the rates and services of gas furnished by Panhandle direct to industrial consumers, but only required Panhandle to file certain information with the Commission. Such order is, therefore, valid under the case of *Arkansas Gas Co. v. Department* (1938) 304 U. S. 61, 82 L. Ed. 1149, and other related cases.

(2) If the order of the Commission is, as contended by Panhandle, an attempted regulation of the rates and service of Panhandle it is valid.

(3) All parties agree that Congress has not regulated sales by Panhandle direct to industrial consumers and there is, therefore, no conflict between state regulation and Federal regulation in this case. Since Congress has not chosen to enact a nation-wide rule in the matters here in question, the power of the State to regulate will not be denied.

(4) The incidence of the particular type of State action here involved throws the balance of any conflict be-

tween local needs and the requirement of freedom for national commerce, in support of the local needs because interference with the national interest in this case is remote and unsubstantial.

(5) The police regulation by the State of Indiana in this case of local aspects of interstate commerce is essential to safeguard vital local interests which are present in this case.

(6) The nature of the State regulation here involved, the objective of the State, and the effect of the regulation upon the national interest in interstate commerce all tend to support the order of the Commission in this case.

(7) The emphasis on the facts and practical considerations in this case, rather than dogmatic logic, clearly indicates that the State regulation here involved is valid.

(8) The decisions of this court involving State regulation of natural gas companies in their activities similar to those involved in this case all support the order of the Public Service Commission of Indiana here attacked.

(9) The adoption by Congress of the Federal Natural Gas Act, and the nature of its provisions, clearly show that Congress did not intend to regulate the matters here involved, but did intend that such matters be regulated by the states.

(10) Panhandle, in selling gas direct to industrial consumers, is a public utility whose business is effected with the public interest under the declaration of Congress in the Federal Natural Gas Act, under the statutes of the State of Indiana, and under the cases decided by this court.

(11) The Commerce Clause of its own force does not preclude the State regulation here involved since national uniformity of regulation is not required, nor does the regulation here involved impede or block interstate commerce.

(12) The impact of a decision in this case holding that Panhandle is wholly free from any regulation, either by the Federal government or by the states in its direct sales to industrial consumers, will completely upset the regulation by the state of Indiana of the natural gas business and cause irreparable damage to the 112,000 natural gas consumers in the State of Indiana.

ARGUMENT

I

Scope of the Commission's Order

Panhandle in its brief (p. 6) has assumed that the order of the Public Service Commission of Indiana in this case constitutes an attempted regulation by the Commission of Panhandle's rates and services in furnishing natural gas direct to industrial consumers in Indiana and therefore violates the Commerce Clause of the United States Constitution. As pointed out in the Additional Statement of The Case herein at page 11 of this brief the order of the Commission merely *required* appellant to file certain information with the Commission including (1) its schedule of rates charged all ultimate consumers in Indiana, (2) its annual reports and, (3) other reports and data. (R171-173)

The order of the Commission did not fix any rates or standards of service nor did it contemplate a hearing on said matters. All that the order required of Panhandle was the filing with the Commission of the matters above set forth. It is true that there are general assertions by the Commission in its opinion accompanying the order that it was the position of the Commission that it could regulate the rates and services of Panhandle. However, the Commission finally stated that when such information was filed with it by Panhandle such information would be deemed to be on file for use by the Commission for all purposes and uses permitted by the Public Service Commission Act of Indiana (R. 190).

The recent expression by this Court in the case of *Rice v. Board of Trade* (1947) 91 L. Ed. Adv. op. 1058 at p. 1062 appears to be appropos this question:

"Respondents' claim of supersedure is, therefore, premature. Until it is known what rules the Illinois Commission will approve or adopt, it cannot be known whether there will be any conflict with the federal law. Any claim of supersedure can be preserved in the state proceedings. And the question of supersedure can be determined in light of the impact of a specific order of the state agency on the Federal Act or the regulations of the Secretary thereunder. Only if that procedure is followed can there be preserved intact the whole state domain which in actuality functions harmoniously with the federal system. For even action which seems pregnant with possibilities of conflict may, as consummated, be wholly barren of it."

The Commission's order in this case is indistinguishable from the order which was held valid by this Court in the case of *Arkansas Gas Co. v. Department* (1938), 304 U. S. 61, 82 L. Ed. 1149, and which applied to a natural gas corporation doing substantially the same business as Panhandle in this case. This Court in holding the order valid said (304 U. S. 63):

"The question for present determination is whether this general order, valid under the laws of the State, which only compels appellant to file certain designated information, amounts to an infringement of any right or privilege guaranteed to it by the Federal Constitution. And to this a negative answer must be given.

"If, as claimed, certain of appellant's activities in Arkansas are parts of interstate commerce, that alone (and no other defense is relied upon) would not

suffice to justify refusal to furnish the information presently demanded by the State."

This same principle has recently been announced by this Court in *Champlin Refining Co. v. United States* (1946) 91 L. Ed. (Adv. op.) 9, 12. Applying the principles of the foregoing cases to the present case the order of the Indiana Commission in this case is valid.

II

Validity of Commission Order As a Regulation of Rates and Service.

Assuming the order attacked in this case to be one attempting to regulate the rates and service of natural gas furnished by Panhandle direct to industrial consumers, the only question is whether that order violates Article 1, Section 8 (3) (Commerce Clause) of the Constitution of the United States.

While some argument might well be made in support of the proposition that the business of Panhandle involved in this case constitutes intrastate commerce and not interstate commerce, (R. 134-135, 201), appellees, Public Service Commission of Indiana, believe that under the decisions of this Court the order of the Commission is valid even assuming Panhandle's business in serving industrial consumers directly to be interstate commerce.

A

Approach To The Question

This Court spoke recently in two cases, (*Freeman v. Hewitt* (1946), 329 U. S. 249, 91 L. Ed. (Adv. Op.) 205)

and (*Prudential Ins. Co. v. Benjamin* (1945), 328 U. S. 408, 90 L. Ed. 1342), one arising from Indiana; of the long continuous process of judicial adjustment involving the power of the states to regulate on matters involving interstate commerce and the limitations upon that power imposed by the Commerce Clause of the Federal Constitution. It recognized that the need for such adjustment was inherent in our form of government where the same transaction concerns the interests and involves the authority of both the central government and of the constituent states. It noted the impossibility of harmonizing all of the decisions on this question and stated that the opinions in this field must be read in the setting of the particular cases and as a pre-occupation with their special facts.

In these cases also this Court indicated the approach or starting point which should be made in deciding cases arising in this field. On the one hand this Court recognized the principle which it had applied in two recent cases³ that the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the State (hereafter discussed in this brief p. 56). On the other hand this Court recognized a broader and more liberal principle when matters of police regulation by a state are involved. In the *Freeman* case this Court said: (91 L. Ed. (Adv. Op.) 208):

These principles of limitation on State power apply to all State policy no matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather than under manifestations

³ *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 89 L. Ed. 1915; *Morgan v. Virginia*, 328 U. S. 373, 90 L. Ed. 1317.

of police power in the conventional sense. But, in the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce, the incident of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. *A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State.* The Minnesota Rate Cases (*Simpson v. Shepard*), 230 U. S. 352, 402 et seq., 33 S. Ct. 729, 741, 57 L. Ed. 511, 48 L.R.A., N.S., 1151, Ann. Cas. 1916A, 18; *South Carolina State Hwy. Dept. v. Barnwell Bros.*, 303 U. S. 177, 625, 58 S. Ct. 510, 82 L. Ed. 734; *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 209-212, 64 S. Ct. 967, 972-973, 88 L. Ed. 1227, 152 A.L.R. 1072. . . . (Our italies)

In the Minnesota Rate Cases (*Simpson v. Shepard*), 230 U. S. 352, 402 et seq. 57 L. Ed. 511 cited in the above quote from the *Freeman* case, this Court said (230 U. S. 402):

"But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. . . . Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for

local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

And in the case of *South Carolina Highway Department v. Barnwell Bros.* (1938) 303 U. S. 177, 82 L. Ed. 734, also cited in the above quote from the *Freeman* case this Court said (303 U.S. 184-185):

"While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. Ever since *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints."

Likewise, in the case of *Illinois Gas Co. v. Public Service Co.* (1941) 314 U.S. 498, 86 L. Ed. 371, this Court said (314 U.S. 505):

"In other cases, the Court, in determining the validity of state regulations, has been less concerned to find a point in time and space where the interstate commerce in gas ends and intrastate commerce begins, and has looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce. Cf. *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185, 187, *et seq.*; *California v. Thompson*, 313 U.S. 109, 113, 114; *Duckworth v. Arkansas*, ante, p. 390. Thus, in *Pennsylvania Gas. Co. v. Public Service Commission*, 252 U.S. 23, where natural gas was transported by pipe line from one state into another and there sold directly to ultimate local consumers, it was held that, although the sale was a part of interstate commerce, a state public service commission could regulate the rates for service to such consumers. While the Court recognized that this local regulation would to some extent affect interstate commerce in gas, it was thought that the control of rates was a matter so peculiarly of local concern that the regulation should be deemed within state power. Cf. *Arkansas Louisiana Gas Co. v. Dept. of Public Utilities*, 304 U. S. 61. . . ."

Finally, in *Prudential Insurance Co. v. Benjamin* (1945), 328 U.S. 408; 90 L. Ed. 1342 this Court said (328 U.S. 420):

"Moreover, the parallel encompasses the latest turn in the long-run trend. For concurrently with the broadening of the scope for permissible application of federal authority, the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with

Congress' unexercised power over commerce, and to doing so by a new, or renewed, emphasis on facts and practical considerations rather than dogmatic logic. These facts are of great importance for disposing of such controversies. For in effect they have transferred the general problem of adjustment to a level more tolerant of both state and federal legislative action."

B

Principles To Be Applied.

From the foregoing cases we learn that the following principles become important in determining the validity of state regulation of the type here involved:

(1) Until Congress chooses to enact a nation-wide rule, the power will not be denied to the State.

(2) In the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial.

(3) A police regulation of local aspects of interstate commerce is a power often essential to a state in safeguarding vital local interests.

(4) This Court has been less concerned to find a point in time and space where interstate commerce ends and intrastate commerce begins, and has looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce.

(5) The tendency is toward sustaining state regulation formerly regarded as inconsonant with Congress' unexercised power over commerce by an emphasis on facts and practical considerations rather than upon dogmatic logic.

It is submitted that the foregoing principles apply to the present case as shown by the Record and have been applied by this Court in its decisions involving the regulation of gas companies doing a business similar to Panhandle in the instant case as will now be shown.

Application of Principles to This Case

Absence of Congressional Action.

Panhandle in its brief (p. 57) concedes that Congress has not acted to regulate direct sales by it to industrial consumers under the Federal Natural Gas Act or otherwise, so there is no question but that Congress has not chosen to enact a nation wide rule governing the sales by companies like Panhandle direct to industrial consumers. The first test for supporting state regulation is therefore satisfied.

Competing Demands of State and National Interests

Since Congress has not acted to regulate the activity of Panhandle herein involved there is no conflict between Federal regulation and the regulation of the State of Indiana and thus no competing demands of State and Federal government to be accommodated. Panhandle's claim that the state regulation herein involved conflicts with the national interest of uniformity will be hereafter separately discussed in this brief at page 56.

Regulation to Protect Vital Local Interests

This Court has recognized that a police regulation of local aspects of interstate commerce is a power often essential to a state in safeguarding vital local interests. This principle is certainly applicable here. As shown by the Record in this case, Panhandle operates a network of natural gas pipe lines in Indiana (R. 126-127) which are illustrated by the map on page 66 of the Record.

From these pipe lines Panhandle serves gas to 7 residential consumers (employees of Panhandle), 2 large industrial consumers—Anchor-Hocking Glass Corporation at Winchester, Indiana, and DuPont at Fortville, Indiana (R. 131, 176), and 14 independent local public utility distributing companies who resell this gas to 97,699 residential consumers, 5,122 commercial consumers and 252 large industrial consumers (R. 132-134). There are a total of 112,000 consumers who are furnished gas directly or indirectly by Panhandle in Indiana.

While Panhandle now serves only two industrial consumers direct (Anchor-Hocking and DuPont) it has announced its policy and purpose to secure and serve direct the other 252 industrial consumers which are now being served by the 14 local public utility distributing companies in Indiana (R. 136-149). If such a program is carried out these local distributing companies stand to lose 62% of their total gross revenues while only being able to dispense with 2% of their plant property. (R. 144-147) This will result in higher rates and lower service to their residential and commercial consumers (R. 145).

At the present time the rates and service of gas furnished by Panhandle to these local public utility distribut-

ing companies are regulated by the Federal Power Commission under the Federal Natural Gas Act, and the rates and service of gas furnished by these distributing companies to their industrial consumers are regulated by the Public Service Commission of Indiana. Thus, in these sales there is a complete and complementary scheme of regulation, Federal and State, working together.

Yet as to those industrial consumers served direct by Panhandle it is the contention of Panhandle that they are not subject to regulation either by the Federal Power Commission or by the Public Service Commission of Indiana. As to these there is a complete *absence* of regulation, Federal and State. Therefore, industrial consumers in Indiana will be in two conflicting groups (1) Those served by Panhandle without any regulation whatsoever and (2) those served by local distributing companies with gas furnished by Panhandle with complete regulation by the Federal and State governments working together. Such a result will completely upset the regulatory scheme in Indiana.

The foregoing facts which are set forth in greater detail at page 9, this brief, on their face show, without need of further argument, the vital local interests necessary to be protected in Indiana. The necessity for the protection of these local interests coupled with the complete absence of the adoption by Congress of any nation wide rule preventing state regulation becomes an important practical consideration in disposing of this case and should override any dogmatic logic. Likewise, the impact of the foregoing facts throws the balance of any conflict between national and state interest in support of local regulation because the interference with the national interest

becomes remote and insubstantial, in comparison, as will be hereafter shown. (This brief p. 62.)

Nature of Regulation, Objective of State.

This Court has been less concerned as to whether the activity involved is interstate or intrastate commerce and has looked to the nature of the state regulation, the objective of the state and the effect of the regulation upon the national interest in commerce. The nature of the regulation here involved, assuming that it purports to regulate rates and service of gas furnished to industrial consumers direct by Panhandle, is to protect all of the consumers of natural gas in Indiana and to insure that all industrial consumers in Indiana are placed upon a substantially equal basis as to rates and service. Likewise, it is to protect and preserve the present system in Indiana of regulating the furnishing of natural gas to ultimate consumers.

Furthermore, it is the objective of the State to provide for that regulation of natural gas companies which is not provided for by the Federal government under the Federal Natural Gas Act so that in the last analysis there is a complete and comprehensive scheme of regulation, both Federal and State, working together. This purpose and objective is wholly consistent with the theory of the Federal Natural Gas Act so accurately described by this Court in *Public Utilities Commission v. United Fuel Gas Co.*, 317 U.S. 456; 87 L. Ed., 396, where the Court said (317 U.S. 467):

“It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The

Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong., 2nd Sess., pp. 1-3; H. Rep. No. 709, 75th Cong., 1st Sess., pp. 1-4; Sen. Rep. No. 1162, 75th Cong., 1st Sess."

The purpose of the regulation here in question and objective of the State is entirely in accord with the theory of the Federal Natural Gas Act and absolutely necessary to protect the vital local interests of the State of Indiana.

Emphasis of Facts of Case.

This Court has said that the tendency is toward sustaining State regulation, formerly regarded as inconsonant with Congress' unexercised power over commerce, by an emphasis on facts and practical consideration rather than dogmatic logic. The foregoing facts and practical considerations discussed above require the application of this principle and compel the support of the type of regulation here involved.

D

**Foregoing Principles Were Applied
In Gas Company Decisions of This Court.**

The principles above discussed have been applied specifically by this Court in cases involving the regulation by the States of natural gas companies, and these decisions support the State regulation involved herein.

The first pertinent case decided by this Court involving state regulation of gas companies was *Public Utilities Commission v. Landon* (1919) 249 U.S. 236, 63 L. Ed. 577. There natural gas was transported interstate by the Receiver of a pipe line company to local distributing companies for resale by them to ultimate consumers. This Court held that the sales of gas to local distributing companies for resale was interstate commerce and not subject to regulation by the State, but that sales by the distributing companies to ultimate consumers could be regulated by the State.

In the case of *Pennsylvania Gas Company v. Public Service Commission* (1920), 252 U.S. 23, 64 L. Ed. 434, this Court held valid an order of the New York Public Service Commission regulating the rates for sales of gas direct by the Pennsylvania Company to ultimate domestic and factory consumers in certain cities in New York. This gas was gathered in Pennsylvania by the company and transported in interstate commerce direct to such consumers (not through a distributing company) and this Court held that such sales were in interstate commerce. Nevertheless, this Court held that the State of New York could regulate the rates for such sales. On this matter this Court said (252 U.S. 28):

"In the instant case the gas is transmitted directly from the source of supply in Pennsylvania to the consumers in the cities and towns of New York and Pennsylvania, above mentioned. Its transmission is direct, and without intervention of any sort between the seller and the buyer. The transmission is continuous and single and is, in our opinion, a transmission in interstate commerce and therefore subject to applicable constitutional limita-

tions which govern the States in dealing with matters of the character of the one now before us."

And again this Court said (252 U. S. 30-31):

"The thing which the State Commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown in the State of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the State, nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.

"This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the States, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest and has not been attempted under the superior authority of Congress.

"It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the State from making local regulations of a reasonable character. Such regulations are always subject to the exercise of authority by Congress enabling it to exert its superior power under the commerce clause of the Constitution.

"The principles announced, often reiterated in the decisions of this court, were applied in the judgment affirmed by the Court of Appeals of New York, and we agree with that court that, until the subject-matter is regulated by congressional action, the exercise of authority conferred by the State upon the Public Service Commission is not violative of the commerce clause of the Federal Constitution."

Further, this Court had occasion to interpret its holdings in both the *Landon* case and *Pennsylvania Gas Company* case, when it decided the case of *Missouri ex rel. Barrett v. Kansas Natural Gas Co.* (1924), 265 U.S. 298, 68 L. Ed. 1027. In that case this Court reaffirmed its holding in the *Landon* case to the effect that the State could not regulate the sales by gas pipe line companies to distributing companies for resale. However, in speaking of its holdings in the *Landon* and *Pennsylvania Gas Company* cases it said (265 U.S. 309):

"In both cases the things done were local and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the *Landon Case*. The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance. But here the sale of gas is in wholesale quantities, not to consumers, but to distributing companies for resale to consumers in numerous cities and communities in different States.

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In 1942 this Court again interpreted its holding in the *Landon* case and *Pennsylvania Gas Co.* case when it decided the case of *Illinois Natural Gas Company v. Central Illinois Public Service Company* (1942) 314 U.S. 498, 86 L. Ed. 371. In this case this Court held that the Federal Natural Gas Act precluded state regulation of sales by gas pipe line companies to distributing companies for resale. In speaking of the *Landon* and *Pennsylvania Gas Company* cases this Court said (314 U.S. 505):

"In other cases, the Court, in determining the validity of state regulations, has been less concerned to find a point in time and space where the interstate commerce in gas ends and intrastate commerce begins, and has looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce. Cf. *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185, 187, *et seq.*; *California v. Thompson*, 313 U.S. 109, 113, 114; *Duckworth v. Arkansas*, *ante*, p. 390. Thus, in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23, where natural gas was transported by pipe line from one state into another and there sold directly to ultimate local consumers, it was held that, although the sale was a part of interstate commerce, a state public service commission could regulate the rates for service to such consumers. While the Court recognized that this local regulation would to some extent affect interstate commerce in gas, it was thought that the control of rates was a matter so peculiarly of local concern that the regulation should be deemed within state power. Cf. *Arkansas Louisiana Gas Co. v. Depart. of Public Utilities*, 304 U.S. 61. . . ."

It is submitted that the reasoning of this Court and its decision in the *Pennsylvania Gas Co.* case (252 U.S. 23),

as interpreted by this Court in the later decisions just discussed above, are applicable to the instant case and support the order of the Commission here involved. Although this Court decided that the furnishing of gas to ultimate consumers in the *Pennsylvania Gas Co.* case was interstate commerce this Court held that the rates to be charged for such sales to ultimate consumers could validly be regulated by the Public Service Commission of New York.

Here we have the same situation. Panhandle is furnishing gas direct (without any distributing company) to industrial consumers in Indiana which activity constitutes interstate commerce yet since these industrial consumers are ultimate consumers the State of Indiana has a right to regulate the rates and service to them because the matter then becomes local under the principles recited in the *Pennsylvania Gas Co.* case.

This interpretation is supported by Prof. Thomas Reid Powell in an article in 58 *Harvard Law Review* 1072, where he said at page 1082:

"Nevertheless the Supreme Court has from the beginning allowed the state both to tax and to fix the price on the first sale or delivery of gas or electricity brought in from a sister state when and if this first sale is also necessarily the last sale because consummated by consumption."

In support of such statement Professor Powell cited *Public Utilities Commission v. Landon* (1919), 249 U.S. 236, 63 L. Ed. 577; *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U.S. 23; 64 L. Ed. 434; *East Ohio Gas Co. v. Tax Commission* (1931), 283 U.S. 465, 75 L. Ed. 1171; *Southern Natural Gas Corp. v. Alabama* (1937), 301 U.S. 148, 81 L. Ed. 970.

Panhandle does not question the result in the *Pennsylvania Gas Co.* case, (Brief p. 27), but seeks to distinguish that case from the present one on the ground that it did not involve direct sales in wholesale quantities to industrial consumers under individual contracts but dealt only with local distribution by the pipe line company of the same character as that made by local distributing companies in the *Landon* case. (Brief, p. 25) Panhandle is in error in such statement.

The sales in the *Pennsylvania Gas Co.* case were direct sales from company to consumer without the intervention of a distributing company. The consumers in that case were domestic and factory consumers. (252 U.S. 31). It does not appear in that case whether the amounts furnished to such factories were in such amounts as Panhandle would consider to be "wholesale" but certainly such gas was not furnished at wholesale in the sense of "for resale" any more than in the instant case.

It is difficult to understand what difference it makes whether gas is furnished in wholesale or large amounts direct to ultimate consumers or whether it is furnished to them in smaller amounts. In both cases it is consumed just as effectively, and the consumption is just as local in either case. The only time the furnishing of gas at "wholesale" makes any difference is when it is so furnished to public utility distributing companies for resale which sales are then subject to the provisions of the Federal Natural Gas Act. In that situation the term "wholesale" is used in its ordinary meaning of "for resale".

It does not appear in the *Pennsylvania Gas Co.* case under what kind of contracts the consumers were served, whether individual or otherwise. But this fact obviously

would not have changed the result in that case, The matter of whether the individual contracts in this case preclude Panhandle from being a Public Utility is discussed in this brief at page 49, and the matter of curtailment of service is discussed in this brief at page 62.

Likewise, Panhandle's statement that the *Pennsylvania Gas Co.* case dealt only with local distribution of the same character as that made by local distributing companies in the *Landon* case is in error. This Court specifically stated in the *Pennsylvania Gas Co.* case that the situation was different from the *Landon* case wherein it had held the activity of furnishing gas by local distributing companies to ultimate consumers to be *intrastate* commerce and subject to state control. (252 U.S. 28). In the *Pennsylvania Gas Co.* case this Court held the activity (which is identical with that in the instant case) to be *interstate* commerce yet also subject to state control.

It is true that in the *Pennsylvania Gas Co.* case this Court held that the service furnished by the company was similar to that of a local plant furnishing gas to a consumer. (252 U.S. 31). So is the service furnished by Panhandle in this case direct to industrial consumers similar to that furnished by local distributing companies to industrial consumers in Indiana. As a matter of fact before Panhandle started serving Anchor-Hocking in this case it had been served by Indiana Gas Distribution Corporation, a local distributing company, which purchased gas from Panhandle and resold it to Anchor-Hocking. (R. 50-51.)

Also the 14 local public utility distributing companies in Indiana purchasing gas from Panhandle serve directly 252 industrial consumers in Indiana (R. 133) and furnish to them a total amount far in excess of the amount fur-

furnished by Panhandle to Anchor-Hocking. (R. 132, 35). Likewise, the service furnished by local distributing companies to industrial consumers is exactly like that furnished by Panhandle to industrial consumers on the matter of curtailment of service (R. 45, 175), and individual contracts. (App. Brief. pp. 36, 14.)

It therefore appears that the service furnished by Panhandle direct to industrial consumers is similar to the service furnished by local public utility distributing companies in Indiana to industrial consumers and should be subject to regulation by the State of Indiana the same as the service furnished by these local distributing companies to industrial consumers.

As heretofore shown, the holding and reasoning in the *Pennsylvania Gas Co.* case, as later followed by the decisions of this Court, may not be effectively distinguished from the present case, and such case, it is submitted, is decisive of the question here involved.

In addition to the foregoing cases this Court has held that the furnishing of gas by interstate pipe line companies direct to industrial consumers was local to the extent of supporting a taxing of such activity by the States. (*East Ohio Gas Company v. Tax Commission* (1931), 283 U.S. 465, 75 L. Ed. 1171; *Southern Natural Gas Corp v. Alabama* (1937), 301 U.S. 148, 81 L. Ed. 970.)

Certainly, if this Court has sustained a state tax upon activity similar to that engaged in by Panhandle in this case, this Court would sustain a police regulation of the type herein involved for as indicated in the *Freeman* case (91 L. Ed. (Adv. Op.) 208):

... * * * Because the greater or more threatening burden of a direct tax on commerce is coupled with

the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce. * * *"

The foregoing cases decided by this Court sustaining state regulation of natural gas pipe line companies clearly support the type of state regulation involved in this case.

E

Natural Gas Act Supports Order in This Case.

As demonstrated previously in this brief the principles which this Court has utilized to test the validity of state regulation of matters involving interstate commerce apply to the present case to support the validity of the Commission's order attacked by Panhandle. Likewise, it has been shown that the decisions of this Court specifically dealing with natural gas pipe line companies and with the type of regulation involved in the present case support the order of the Commission. These results are confirmed by the enactment by Congress of the Federal Natural Gas Act.

The Federal Natural Gas Act was enacted by Congress in 1938 and amended in 1942. (52 Stat. 821 *et seq.* 15 U.S.C.A. 717 *et seq.* Section 1 (a) of this law (52 Stat. 821) 15 U.S.C.A. 717 (a) declares:

"* * * that the business of transporting and selling natural gas for ultimate distribution to the public is affected with the public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."

Section 1(b) of the law (52 Stat. 821; 15 U.S.C.A. 717 (b)) provides:

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

From the foregoing provisions of the law it is clear that the only sales of natural gas subject to the law are those for resale. Specifically it does not apply to any other sales which definitely excludes from its operation direct sales to large industries for their own consumption.

The statute followed the decided cases heretofore discussed holding that the states could not regulate the sale of natural gas from interstate pipe lines to local utilities for resale. (*Missouri ex rel. Barrett v. Kansas Natural Gas Co.* (1924) 265 U.S. 298, 68 L. Ed. 1027; and *Public Service Commission v. Attleboro Steam & Electric Co.* (1927) 273 U.S. 83; 71 L. Ed. 549).

Likewise, it had been established by the decisions of this Court heretofore discussed, that the states did have jurisdiction over sales of natural gas from interstate pipe lines direct to ultimate consumers even though the gas came directly from interstate pipe lines. *Public Utilities v. Landon* (1919) 249 U.S. 236, 63 L. Ed. 577; *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U.S. 23, 64 L. Ed. 434; *Missouri ex rel. Barrett v. Kansas*

Natural Gas Co. (1924) 265 U.S. 298, 68-L. Ed. 1027; *Illinois Natural Gas Co. v. Central Illinois Public Service Company* (1942) 314 U.S. 498, 86 L. Ed. 371).

The statute therefore served to affirm and implement the rights of control which the cases had already established. That this was the intent of Congress is shown by the legislative history of the Act and recognized in the decisions of this Court. (*Public Utilities Commission of Ohio v. United Fuel Gas Co.* (1943) 317 U.S. 456, 467, 87 L. Ed. 396; *Illinois Natural Gas Co. v. Central Illinois Public Service Co.* (1942) 314 U.S. 498, 506, 507, 86 L. Ed. 371; *Colorado Interstate Gas Co. v. Federal Power Commission* (1944) 324 U.S. 581, 600-601, 89 L. Ed. 1206; *Federal Power Commission v. Hope Natural Gas Co.* (1943), 320 U.S. 591, 609-610; 88 L. Ed. 333).

Referring to the legislative history of the Act and speaking of the scheme of the regulation intended by the Natural Gas Act, this Court said in *Public Utilities Commission of Ohio v. United Fuel Gas Co.* (317 U.S. 467):

"It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong., 2d Sess., pp. 1-3; H. Rep. No. 709, 75th Cong., 1st Sess., pp. 1-4; Sen. Rep. No. 1162, 75th Cong., 1st Sess."

Report No. 709, 75th Congress, 1st Session, referred to in the above quotation from the *United Fuel Gas Co.* case, *supra*, reads as follows:

“It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U.S. 23.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri v. Kansas Gas Co.* (1924), 265 U.S. 298, and *Public Utilities Commission v. Attleboro Steam & Electric Co.* (1927), 273 U.S. 83.) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act.”

The foregoing quoted report was again referred to by this Court in *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 506, 86 L. Ed. 371.

Quite recently this Court again referred to the history and purpose of the Federal Natural Gas Act in the case of *Interstate Natural Gas Co. v. Federal Power Commission*, (1947), 91 L. Ed. (Adv. Op.) 1355, and said (p. 1359):

"As was stated in the House Committee report, the 'basic purpose' of Congress in passing the Natural Gas Act was 'to occupy this field in which the Supreme Court has held that the States may not act.' In denying the Federal Power Commission jurisdiction to regulate the production or gathering of natural gas, *it was not the purpose of Congress to free companies such as petitioner from effective public control.* The purpose of that restriction was, rather, to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act. Thus the House Committee Report states: 'The bill takes no authority from State Commissions, and is so drawn as to complement and in no manner usurp State regulatory authority.' * * * " (Our italics.)

This Court held in that case that sales made by a natural gas producing company in the field to pipe line companies which transport the purchased gas to markets in other states constitute sales for resale in interstate commerce and are thus subject to the provisions of the Federal Natural Gas Act. This Court indicated in the above quote, however, that the state could validly regulate sales though technically consummated in interstate commerce, made during the course of production and gathering which were so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent, or a substantial interference with the exercise by the state of its regulatory functions. This Court then pointed out in that case that there was no

indication in the Record that regulation by the Federal Power Commission would conflict with state regulation.

In the present case we are not dealing with regulation by the state of production and gathering but with the other end of the process—ultimate consumption. However, if the state may regulate the beginning of the process (production and gathering) by the same reasoning they should be able to regulate the end of the process. (Ultimate consumption). All parties herein agree that the middle part of the process, transportation and sales for resale, are subject to the provisions of the Federal Natural Gas Act and also that sales direct to industrial consumers do not involve sales for resale and are not subject to the provisions of the Federal Natural Gas Act.

On the matter of conflict of regulation between the Federal government and the State of Indiana in this case we have the reverse of the situation in the *Interstate* case, *supra*. In this case all parties agree that there is no regulation by the Federal Power Commission of direct sales by Panhandle to industrial consumers, so there is no conflict with the regulation by the State of Indiana here involved. Unless and until Congress adopts a law authorizing the Federal Power Commission to regulate the type of activity involved in this case there is no conflict between the Federal and State regulation and such State regulation should be sustained.

That Congress further did not intend to disturb State regulation is further indicated in Section 17 p (b) and (c) (52 Stat. 831; 15 U.S.C.A. 717 p) of the Federal Natural Gas Act which provides in part as follows:

"The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

"The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. * * *

This fact was recognized by this Court as important recently in the case of *Rice v. Board of Trade* (1947), 91 L. Ed. (Adv. Op.) 1058, at 1062:

"* * * Moreover the provision in § 12 of the Act that the Secretary 'may cooperate with any department or agency of the Government, any State * * * or political subdivision thereof' supports the inference that Congress did not design a regulatory system which excluded state regulation not in conflict with the federal requirements. See *Townsend v. Yeomans*, 301 U.S. 441, 454, 57 S.Ct. 842, 848, 81 L.Ed. 1210; *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 209, 64 S.Ct. 967, 972, 88 L.Ed. 1227."

Panhandle, in its brief (pp. 57 to 65) states that the Federal Natural Gas Act in no way changed the situation here in question. It contends that prior to the Act the Commerce Clause of its own force precluded state regulation of the type here involved and that the Act did not

authorize the states to regulate such activity. We believe that we have completely answered this contention in the preceding discussion herein of our interpretation of the legislative history of the Federal Natural Gas Act.

In support of its position that direct sales by it to industrial consumers were intended by Congress to be completely free of all regulation, Federal and State, Panhandle cites in its brief (pps. 62, 22, 51, 61, 62 and 65) the Report of the Committee on Interstate and Foreign Commerce of the House of Representatives on Amending the Natural Gas Act submitted to the House on July 7, 1947 (Report No. 800, 80th Cong. 1st Sess.).

An examination of the text of the report quoted by Panhandle in its brief at pages 51 to 53 and 62 to 63 and of the factual and legal basis for such text as shown in the hearings before such Committee, preceding its report, clearly shows its pepper-corn value in determining the intention of Congress in enacting the Federal Natural Gas Act; nine years before the issuance of this report.

On the *last* day (May 29, 1947) of the hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on Amendments To The Natural Gas Act,⁵ Mr. John Benton, representing the National Association of Railroad and Utility Commissioners submitted amendments to the Federal Natural Gas Act to make it clear beyond the proverbial "shadow of a doubt" that Congress intended to leave the matter of regulation of direct sales to industrial consumers by interstate pipe line companies to the states. (Hearings, pp. 634 to 660).⁵ Mr.

⁵ Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 2185, H.R. 2235, H.R. 2292 and H.R. 2956 (April-May, 1947).

Benton submitted a written statement in support of these amendments including a copy of the opinion of the Indiana Supreme Court which is now before this Court in this case. (Hearings, pp. 656 to 660).⁵

On the same day the Committee received a long letter from John S. L. Yost, General Attorney for Panhandle Eastern Pipe Line Company, who is one of the attorneys representing Panhandle in this very case, opposing these amendments. In his letter Mr. Yost presents practically the same arguments and authorities which he has utilized in his brief in this case. (Hearings,⁵ pp. 696-700). This whole matter was presented to the Committee by Mr. Benton and Mr. Yost just ten days after this Court noted probable jurisdiction in this case. (May 19, 1947.) Later, Mr. Benton replied to Mr. Yost's letter and it was filed with the Committee. (Hearings, pp. 716-718.) We have been unable to find from an examination of the record of the Hearings⁵ that any other evidence was before the Committee except the arguments of Mr. Yost and Mr. Benton as above indicated.

Thereafter, the Committee made its report as hereinbefore mentioned and said (Report of the Committee on Interstate and Foreign Commerce of the House of Representatives on Amending the Natural Gas Act; No. 800, 80th Cong., 1st Sess.; page 10):

"The bill makes no change in the present law as to direct sales by pipe lines to industrial consumers, which sales, under the Natural Gas Act, are exempt from Federal Power Commission jurisdiction. Your committee feels that no change is necessary in the public interest.

"Your committee has considered the amendment offered by the National Association of Railroad and Utility Commissioners, proposing to permit the various States to exercise jurisdiction over direct sales, and has concluded that the adoption of the amendment would not be in the public interest but would be more likely to add to the existing confusion.

"The pipe line does not occupy a utility status with reference to direct sales. By the regulation of the utilities which serve him, the small consumer who goes about his day's work is protected from exorbitant rates, but direct sales are made to business, factories, etc. They are sales at arm's length. The purchaser is engaged in the business of securing fuel at the lowest possible price. He is his own protection. He does not need the aid of a regulating authority. Competition is the proper arbiter of prices in such direct sales. As in other businesses under our competitive system of free enterprise, this problem should be left to the businessmen themselves, to the pipe lines and their customers. They know the business and deal with each other on a fair-bargaining basis.

"Your committee feels that to alter the present situation would present a chaotic situation. If the States were given jurisdiction over direct sales by a pipe line traversing several States, it would be under a dual system of control by the Federal Power Commission and the States. There is no assurance of uniformity of treatment by the different states. The power to regulate direct sales would include the power of curtailment and interruption of service. The different States would conceivably have different views on the matter of curtailment and interruption regardless of its affect on the needs for gas in other States. Curtailment and interruption of service concerns more than one State and endless confusion and conflict would arise between

different States demanding gas as between States and the pipe lines. Also it is conceivable that conflicts would arise between the Federal Power Commission jurisdiction as against the demands of the States to regulate prices, to interrupt service and to curtail service.

"It is not necessary to exercise regulatory controls over direct sales in order to assure adequate service to the utility consumers. With the amendment made by section 6 of the bill there will be no doubt as to the power of the Commission to compel a pipe line to render good service for sales under the Commission's jurisdiction."

It is obvious that the Committee in its report merely reflected the present views of Panhandle's attorney on the issues in this case. It is interesting to note that Mr. Carson who made the report for the Committee at first seemed to entirely agree with Mr. Benton's views but apparently later changed his mind. (Hearings, p. 640.)

It is interesting to note also that in this same report made by the Committee on Interstate and Foreign Commerce (No. 800, 80th Cong., 1st Sess. p. 6) it undertook to disagree with this Court in its interpretation of the Federal Natural Gas Act on production and gathering announced in the cases of *Canadian River Gas Co. v. Federal Power Commission* (1945) 324 U.S. 581, 89 L. Ed. 1206; and *Interstate Natural Gas Co. v. Federal Power Commission* (1947), 91 L. Ed. (Adv. Op.) 1355.

Finally, the very text of the report of the Committee indicates its weakness. It is based on two propositions (1) interstate pipe line companies furnishing gas direct to ultimate consumers do not occupy a public utility status and (2) national uniformity on such sales is essential and

state regulation is therefore precluded by the commerce clause of its own force. These propositions will next be taken up in order.

F

Panhandle As A Public Utility.

Panhandle, throughout its brief, keeps suggesting, without making a direct contention, that it is not engaged in the public utility business in furnishing gas direct to industrial consumers. On page 27 of its brief it cites the case of *Sioux City v. Missouri Valley Pipe Line Co.* (N.D. Ia. 1931) 46 F. (2d) 819; as being the first important case holding state regulation of the type here involved to be invalid. One of the important holdings in that case, as contended by Panhandle, was that service of gas direct by an interstate pipe line company to two local plants did not constitute a public utility business. Likewise, on page 52 of its brief, Panhandle quotes the Report of the Committee on Amendments to the Natural Gas Act (1947) to the effect that Congress intended that there be no regulation of sales direct to industrial consumers by interstate pipe line companies because such activity did not constitute a public utility business. This again is emphasized by Panhandle in its brief at pages 60 to 62.

The substance of this contention seems to be that the State of Indiana cannot by statute make the business of Panhandle's sales direct to industrial consumers a public utility business or affected with public interest if it is in fact a private business, for that would be a taking of Panhandle's property without compensation. That contention, however, is one which may only properly be raised in this case under the Fourteenth Amendment to the Con-

stitution of the United States. (*Champlin Refining Co. v. U. S.* (1947) 91 L. Ed. (Adv. Op.) 9, 12; *Producer's Transportation Co. v. U. S. R. R. Commission* 251 U.S. 228, 230-231, 64 L. Ed. 239). Panhandle in its Assignment of Errors in this case (R. 222-227) which it adopted as its Statement of Points Relied Upon (R. 234) does not claim that the order of the Public Service Commission in this case, or the applicable statutes of Indiana are invalid as a violation of the Fourteenth Amendment to the Constitution of the United States and therefore may not now urge this question. (Rule 27 (4) of Supreme Court of United States). The only constitutional provision which Panhandle claims is involved as shown in its brief, (p. 6) and Assignment of Errors (R. 222-227) is Article 1, Section 8 (3) of the Constitution of the United States. It has already been demonstrated in this brief that the order of the Commission in this case does not conflict with this constitutional provision.

However, from all established tests and principles it seems clear to appellees that Panhandle in furnishing gas direct to industrial consumers is certainly engaged in the public utility business, but in view of the contrary implication in Panhandle's brief, we shall discuss it.

Congress itself in Section 1 (a) of the Federal Natural Gas Act declared (52 Stat. 821 *et. seq.*; 15 U.S.C.A. 717 (a)):

"As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."

In Indiana the term "public utility" is defined in the Public Service Commission Law to be (Section 54-105 Burns 1933):

"* * * . . . every corporation . . . , that now or hereafter may own, operate or control any . . . plant or equipment . . . for the . . . transmission, delivery or furnishing of heat, light, water or power . . . either directly or indirectly to or for the public . . . ,"

In Section 54-601 A of Burns 1933 (1945 Pocket Supp.) the term, "gas utility" is defined to be:

"* * * 'any public utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the State of Indiana, for his, its or their domestic, commercial or industrial use.' * * *"

Admittedly, Panhandle is selling gas in Indiana indirectly to and for the public through independent distributing companies. Also it is selling and proposing to sell gas directly to consumers in Indiana. In either case it is a public utility within the definition of the statute. As to its sales to distributing companies for resale it is only subject to the jurisdiction of the Public Service Commission of Indiana to the extent that it does not conflict with the jurisdiction of the Federal Power Commission. But this factor does not exclude it from the definition of the term "public utility" as used in the Indiana law.

At any rate the Supreme Court of Indiana in its opinion interpreted the foregoing statutes of Indiana as including the direct sales to industrial consumers by Panhandle as a public utility business and this construction of a state statute by the highest court of the State has been held by

this Court to be binding upon it. *Railroad Commission of Texas v. Pullman Co.* (1940); 312 U.S. 496, 499-500, 85 L.Ed. 971, *Texas Co. v. Alton R. Co.* (1941), 117 F. (2d) 210, 213 Cert. denied, 313 U.S. 570, 85 L. Ed. 1529.

Moreover, the activities of Panhandle in furnishing gas direct to industrial consumers constitute a public utility business under well established principles of this Court. Since the decision by this Court in the case of *Munn v. Illinois* (1876), 94 U.S. 113, 24 L. Ed. 77, decided more than seventy years ago, but recently followed by this Court in the tobacco sales case (*Townsend v. Yeomans*, (1937), 301 U.S. 441, 81 L. Ed. 1210, and also the Pipe Line cases (1914), 234 U.S. 548, 58 L. Ed. 1459; the propriety of regulation of certain businesses has not been questioned. At page 126 of 94 U.S., this Court said:

“* * * Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.”

Applying the principle announced in the *Munn* case to the instant case it is clear that Panhandle is using its property in a manner to make it of public consequence and it affects the community at large. As shown in the Additional Statement of the Case, *anti*, page 6. Panhandle has a network of pipe lines in Indiana from which it serves directly two industrial consumers and indirectly through

local distributing companies, not affiliated with Panhandle, approximately 112,000 consumers in Indiana. Also, Panhandle has clearly indicated, and taken steps to carry out a program to serve direct all of the industrial consumers in Indiana, thus taking away from the local distributing companies approximately 252 industrial consumers. Such a result will cause a reduction in gross revenues of such distributing companies of approximately 62% which will result in higher rates and less service to the 112,000 gas consumers in the State of Indiana.

Moreover, it has been shown that under the present scheme of regulation in Indiana the Public Service Commission is now regulating the sales by local distributing companies to their 252 industrial consumers, and the sales of gas which Panhandle makes to these companies for resale to such industrial consumers are regulated by the Federal Power Commission, making a complete system of regulation. Yet if Panhandle is correct in its position in this case, then the sales which it makes direct to its industrial consumers are not subject to regulation by either the Federal Power Commission or the State of Indiana. This would create in Indiana a situation where sales to certain industrial consumers are completely regulated, and as to others, wholly unregulated. This would destroy all Indiana regulation of sales to industrial consumers.

In view of the foregoing facts established in the Record in this case, to say that Panhandle's sales direct to industrial consumers is of no public consequence and does not affect the community at large would, to say the least, be quixotic.

The fact that Panhandle in furnishing gas direct to industrial consumers does so under individual contracts which provide for curtailment of service becomes rather unimportant when it is admitted by Panhandle in its brief (pp. 14, 36, 50) that it furnishes gas also to distributing companies for resale under the same type of individual contracts providing for curtailment of service. This is also shown by the Record in this case. (R. 45, 134) Panhandle goes even farther in its brief and says (p. 36) the only difference between its sales to industrial users and distributing companies is only the anticipated use of the product by the buyer. Yet Congress is regulating the business of furnishing gas to distributing companies by Panhandle as a public utility and Panhandle is not contesting, but conceding its jurisdiction, even though it is furnishing gas to distributing companies under individual contracts providing for curtailment.

It is submitted that if Panhandle is thus occupying a public utility status in furnishing gas to distributing companies, (and it doesn't deny it) under the Federal Natural Gas Act, then it occupies a public utility status in serving industrial consumers direct for the service to each as claimed by Panhandle is the same.

Panhandle's contention that it is not a public utility subject to regulation in its sales direct to industrial consumers was fully answered in the case of *Industrial Gas Co. v. Public Utilities Commission of Ohio* (1939), 135 Ohio St. 408, 21 N.E. (2d) 166, 168, where the Court said:

"It may well be urged that a corporation, calculated to compete with public utilities and take away business from them, should be under like regulatory restriction if effective governmental supervision is

to be maintained. Actual or potential competition with other corporations whose business is clothed with a public interest is a factor to be considered; otherwise corporations could be organized to operate like appellant and in competition with bona fide utilities until the whole state would be honey-combed with them and public regulation would become a sham and delusion.

"What appellant seeks to do is to pick out certain industrial consumers in select territory and serve them under special contracts to the exclusion of all others except such private or domestic consumers as may suit its convenience and advantage. There were other industrial consumers with whom the appellant refused or failed to agree and so did not serve them. If such consumers were served at all, it must necessarily be by a competitor. If a business so carried on may escape public regulation then there would seem to be no valid reason why appellant may not extend the service to double, triple or many times the number now served without being amenable to regulative measures."

To the same effect as the above case are *Orndoff v. Public Utilities Commission of Ohio* (1939) 135 Ohio St. 438, 21 N.E. (2d) 334; and *Terminal Taxicab Co. v. Kutz* (1915), 241 U.S. 252, 60 L. Ed. 984; *Re. Potter Development Co.* (1939), 32 P.U.R. (N.S.) 45.

The foregoing facts and authorities clearly indicate the untenability of Panhandle's suggestion and authorities cited in support thereof that it does not occupy a public utility status in its sales direct to industrial consumers.

**Commerce Clause of Its Own Force and Need
for National Uniformity.**

We have left to the last part of this brief Panhandle's main contention in this case because it could not adequately be discussed without first presenting to this Court the foregoing parts of this brief.

In the main, Panhandle claims (Brief p. 44-45) that the Commerce Clause of its own force precludes any state regulation of its sales direct to industrial consumers because national uniformity of regulation of such sales is necessary and a state is precluded from acting to impede or block the free flow of commerce.

In support of this claim Panhandle in its brief (p. 44) cites certain language used in the case of *Freeman v. Hewitt* (1946), 329 U.S. 249, 252, 91 L. Ed. (Adv. Op.) 205. As pointed out earlier in this brief (p. 20), the *Freeman* case after recognizing that the Commerce Clause of its own force precluded state taxation in certain instances recognized a more liberal and broader rule to be applied when a state police regulation was involved. This has been shown in detail previously in the Argument in this brief at pages 20 to 24. Suffice it to repeat that this Court indicated in the *Freeman* case that a police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests and until Congress chooses to enact a nation-wide rule, the power will not be denied to the State. As heretofore shown, these tests are amply supported by the record in this case. (*Ante* pps. 25 to 29).

This Court in two other recent cases has discussed the scope of the negative function of the Commerce Clause

and the restraints imposed by it upon state power (*Prudential Insurance Co. v. Benjamin* (1946), 328 U.S. 408, 90 L. Ed. 1342; *Robertson v. People of State of California*, 328 U.S. 440, 90 L. Ed. 1366). In each of those cases it was contended that the state regulation of the insurance business was precluded by the Commerce Clause of its own force, but this contention was rejected in each case upon factors which are likewise present in the instant case.

Panhandle's claim in this case is reminiscent of the claims of *Prudential* in the *Benjamin* case that the Commerce Clause of its own force precluded state regulation regardless of the action or inaction of Congress. In the *Benjamin* case these contentions were disposed of when this Court said (328 U.S. 421):

"As has been stated, they are the cases which from *Welton v. Missouri*, 91 U.S. 275, 23 L.Ed. 347, until now have outlawed state taxes found to discriminate against interstate commerce. No one of them involved a situation like that now here. In each the question of validity of the state taxing statute arose when Congress' power lay dormant. In none had Congress acted or purported to act, either by way of consenting to the state's tax or otherwise. Those cases therefore presented no question of the validity of such a tax where Congress had taken affirmative action consenting to it or purporting to give it validity. Nor, consequently, could they stand as controlling precedents for such a case."

In the present case it has been shown that the power of Congress to regulate the natural gas business is not dormant, but has been exercised by Congress in enacting the Federal Natural Gas Act. It has taken unto itself the

regulation of certain phases of the business and left other phases of the business, including that here in question, for local regulation. (*Ante*, p. 38).

In the *Robertson* case the negative function of the Commerce Clause was directly involved without any attending action by Congress. In other words, the question was whether a state could license insurance agents engaged in interstate commerce when the power of Congress had never been exercised, but lay dormant. It was contended that the Commerce Clause of its own force precluded such state regulation. This Court rejected this contention and said (328 U.S. 448):

"That appellant's activities were of a kind which vitally affect the welfare and security of the local community, the state and their residents could not be denied. Cf. *Hoopston Canning v. Cullen*, 318 U.S. 313, 316 ff, 63 S.Ct. 602, 605, 87 L.Ed. 1722, 145 A.L.R. 1113. * * *"

This Court also stated (328 U.S. 459):

"It is quite obvious, to repeat only one of those considerations, that if appellant's contentions were accepted and foreign insurers were to be held free to disregard California's reserve requirements and then to clothe their agents or others acting for them with their immunity, not only would the state be made helpless to protect her people against the grossest forms of unregulated or loosely regulated foreign insurance, but the result would be inevitably to break down also the system for control of purely local insurance business. In short, the result would be ultimately to force all of the states to accept the lowest standard for conducting the business permitted by one of them or, perhaps, by foreign countries. Inevitably this would mean that Congress

would be forced to intervene and displace the states in regulating the business of insurance. Neither the commerce clause nor the South-Eastern decision dictates such a result."

As demonstrated in this brief previously (p. 26), if Panhandle is left free, without any federal or state regulation in the instant case, to serve all the industrial consumers in Indiana, this will destroy the present system of regulation in Indiana of the natural gas business and cause irreparable damage to the 112,000 gas consumers in the State of Indiana.

The cases of *Missouri ex rel. Barrett v. Kansas Natural Gas Co.* (1924), 265 U.S. 298, 68 L. Ed. 1027 and *Public Utilities Commission v. Attleboro Steam and Electric Co.* (1927.), 273 U.S. 83, 71 L. Ed. 549 relied upon by Panhandle do not preclude the state regulation in this case. The *Barrett* case involved sales by an interstate pipe line company, not to consumers, but to independent local distributing companies for resale by them to local consumers. The Court held that the activity was interstate commerce and that there were no local aspects present to justify any state regulation. The Court distinguished the *Landon* and *Pennsylvania Gas Co.* cases (heretofore discussed in detail p. 30 of this brief) in this language (265 U.S. 309):

"In both cases the things done were local and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the *Landon Case*. The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local

distribution be made by the transporting company or by independent distributing companies. In such case the *local interest is paramount*, and the interference with interstate commerce, if any, indirect and of minor importance. * * * (Our italics).

Then this Court said as to the activities in the *Barrett* case (265 U.S. 309):

"* * * But here the sale of gas is in wholesale quantities, *not to consumers*, but to distributing companies for resale to consumers in numerous cities and communities in different States. * * * (Our italics.)

Also, in the *Attleboro* case (273 U.S. 83) the question again involved regulation by a state of sales by an interstate electric company to a local distributing company for resale. This Court followed the *Barrett* case and held the regulation invalid. But again the *Pennsylvania Gas Co.* case was distinguished by this Court when it said (273 U.S. 89):

"It is clear that the present case is controlled by the *Kansas Gas Co.* case. *The order of the Rhode Island Commission is not as in the Pennsylvania Gas Co. case, a regulation of the rates charged to local consumers*, having merely an incidental effect upon interstate commerce, but is a regulation of the rates charged by the Narragansett Company for the interstate service to the Attleboro Company, which places a direct burden upon interstate commerce. Being the imposition of a direct burden upon interstate commerce, from which the State is restrained by the force of the Commerce Clause, it must necessarily fall, regardless of its purpose. * * * (Our italics).

From the foregoing cases relied upon by Panhandle, coupled with the case of *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U.S. 23, 64 L. Ed. 434 (this brief, p. 30) the conclusion is inescapable that this Court has considered that the furnishing of natural gas by interstate pipe line companies in either intrastate or interstate commerce direct to *local consumers* is a local activity of paramount local importance which the states may regulate. (See Article of Prof. Powell in 58 Harvard Law Review 1072, 1082, quoted in part in this brief, *ante*, p. 34.)

Panhandle denies this conclusion and states that its activities in selling direct to industrial consumers are more akin to its sales to distributing companies for resale which this Court has held this state may not regulate, but are regulated by Congress. If this is true, is it not odd that Congress did not provide for the regulation of Panhandle's sales direct to industrial consumers at the same time that it provided for the regulation of Panhandle's sales to distributing companies for resale when it enacted the Federal Natural Gas Act? This versatility of argument by Panhandle inverting state and national power, each in alternation to ward off the other's incidence is obviously a product of self interest on the part of Panhandle to engage in a business wholly unregulated by either the Federal or State governments.

Panhandle overlooks the fact that in selling its gas direct to industrial consumers it is engaging in a business similar to that done by local distributing companies in selling gas to its industrial consumers. In each case gas is furnished under individual contracts providing for interruptible service and the local distributing companies

are furnishing large amounts of gas to their industrial consumers also. (R. 132) Moreover, the important similarity between Panhandle's sales to industrial consumers and the sales by local distributing companies to industrial consumers is the fact which this Court considered important in the *Pennsylvania Gas Co.* case that they are both serving local consumers which vitally affects local interests.

Panhandle claims, however, in its brief (pp. 14, 43) that national uniformity of regulation of sales by interstate pipe line companies direct to industrial consumers is necessary in the national interest and precludes state regulation. Panhandle's argument amounts to this: 'That because conditions of interruptible service might vary at different sections along its transmission lines from Texas to Michigan, any regulation by one state might interfere with the interstate transportation to another state. In this sense, Panhandle is speaking of *interstate transportation* which is under the control of Congress under the Federal Natural Gas Act and which the state is precluded from regulating. (52 Stat. 821; 15 U.S.C.A. 717) Unless and until state would make a regulation of this *transportation* the question is not presented. Certainly in this case there is no regulation of that kind involved.'

It seems pertinent to remark at this point that if Panhandle is correct in its contention that national uniformity of regulation was required in this regard, that Congress would not have overlooked this fact when it passed the Federal Natural Gas Act. Since Congress entered upon the regulation of certain interstate features of the gas business in passing this Act it would seem that if national uniformity were required on this matter it would have pro-

vided for regulation to insure it. Panhandle admits, however, that Congress did not provide for such regulation. That Congress did not believe national uniformity was required has already been indicated herein at page 38, *ante*, in discussing the legislative history of the Federal Natural Gas Act.

Another significant fact as shown by the Record in this case is that this matter of interruptible service has existed under state regulation without conflict or turmoil for some time. While Panhandle furnishes gas direct to industrial consumers under individual contracts providing for interruptible service it does the *same thing* in furnishing gas direct to local distributing companies for resale. Also these local distributing companies purchasing Panhandle gas do the *same thing* by furnishing gas direct to their industrial consumers under individual contracts providing for interruptible service. (R. 45, 134, 175).

These local distributing companies in furnishing gas direct to industrial consumers under individual contracts providing for interruptible service have always been subject to the regulation by the Public Service Commission of Indiana. There is nothing in the Record in this case to show that this regulation has interfered in any way with Panhandle's operations.

The Record in this case is barren of any facts to show that the regulation by the Public Service Commission of Indiana of direct sales by Panhandle to industrial consumers has or will have any injurious effect upon Panhandle's operations as to curtailment of service or otherwise. Until such facts are shown, Panhandle's contention is too premature and hypothetical to warrant consideration on this Record. "Action which sometimes seems pregnant

with possibilities of conflict, may, as consummated, be wholly barren of it." (*Rice v. Board of Trade*, (1947), 91 L. Ed. (Adv. Op. 1058, 1062; *Champlin Refining Co. v. United States* (1947), 91 L. Ed. (Adv. Op.) 9, 12.)

Moreover, this Court has held, as a matter of law, that direct sales by interstate pipe line companies to local consumers do not require national uniformity. In *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23, this Court said: (252 U.S. 31)

"This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the States, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest and has not been attempted under the superior authority of Congress.

"It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the State from making local regulations of a reasonable character. Such regulations are always subject to the exercise of authority by Congress enabling it to exert its superior power under the commerce clause of the Constitution."

• The cases of *Southern Pacific Co. v. Arizona* (1945), 325 U. S. 761 and *Morgan v. Virginia* (1946), 328 U. S. 373, relied upon by Panhandle in its brief (pp. 43, 45) do not preclude the state regulation here in question. Both cases may be distinguished from the present one on at least three grounds. They were regulations of pure interstate transportation, where the activity regulated entered the state,

passed through it and continued to other states. In this case the activity regulated comes to an end in this state by local consumption.

Also these cases were regulations in the realm of pure interstate commerce and transportation in which Congress had in no way acted and its power lay dormant. In this case Congress has acted by occupying part of the field of the regulation of the gas business and has left the other matters to be regulated by the states. Finally, there was not present in either case any vital local interests to be protected. In this case we have previously demonstrated that there are undeniable vital local interests which must be protected.

Panhandle in its brief cites other cases to support its position that the State of Indiana may not regulate its sales direct to industrial consumers. On page 27 of its brief it cites *Sioux City v. Missouri Valley Pipe Line Co.* (N. D.) Ia. (1931) 46 F. (2d) 819. There it was held that a city could not prohibit an interstate pipe line company from laying its lines and furnishing gas to two plants without the consent of the city. No such question is involved in this case.

The decision of the Colorado Public Service Commission in *Re. Colorado Interstate Gas Co.*, P. U. R. 1933 E 349, (App. Brief, p. 28) is in apparent conflict with the decision of the Supreme Court of Indiana on the question at issue, but it is submitted that the opinion, of the Indiana Supreme Court should be more persuasive to this Court than that of the Colorado Public Service Commission.

The case of *State ex rel. Cities Service Company v. Public Service Commission* (1935) 337 Mo. 809, 85 S. W. (2d) 890 (App. brief, p. 29) was later distinguished and

questioned by the Missouri Supreme Court in *Mississippi River Fuel Corp. v. Smith* (1942), 350 Mo. 1, 164 S. W. (2d) 370, at p. 376, when it cautioned that the ruling in that case was prior to the rulings of this Court in *Southern Natural Gas Corporation v. Alabama*, 301 U. S. 148, 81 L. Ed. 970, and *Arkansas Louisiana Gas Co. v. Department* (1938) 304 U. S. 61, 82 L. Ed. 1149.

The case of *Interstate Natural Gas Co. v. La. Public Service Commission* (E. D. La.—1940) 34 F. Supp. 980 holds that the pipe line company there involved was not a public utility and not subject to state control. We have demonstrated herein (p. 49) that Panhandle in the activities here in question is a public utility.

CONCLUSION.

It is submitted that the applicable principles of law, announced by this Court in its decisions reviewed in this brief, applied to the facts in this case, established by the Record, support the order of the Public Service Commission of Indiana in this case, and that the judgment of the Supreme Court of Indiana should be affirmed.

Respectfully submitted,

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No. 69

IN THE
Supreme Court of the United States

OCTOBER TERM, 1947.

PANHANDLE EASTERN PIPE LINE COMPANY, *Appellant,*

v.

THE PUBLIC SERVICE COMMISSION OF INDIANA, ET AL.,
Appellees.

BRIEF FILED ON BEHALF OF THE NATIONAL
ASSOCIATION OF RAILROAD AND UTILITIES
COMMISSIONERS, AMICUS CURIAE.

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October 28, 1947.

● INDEX.

	Page
OPINION BELOW	1
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
THE QUESTION PRESENTED	5
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. PANHANDLE'S DIRECT SALES TO INDUSTRIAL CONSUMERS ARE SUBJECT TO STATE REGULATION EVEN THOUGH ASSUMED TO CONSTITUTE INTERSTATE COMMERCE	7
A. Such Sales May Be Regulated Under the Principle That, Where the Subject Matter of Regulation is Primarily a Matter of Local Concern Not Requiring National Uniformity, the States May, in the Absence of Conflicting Federal Legislation, Make Laws Affecting or Regulating Interstate Commerce	7
(1) <i>The basic constitutional principle</i>	7
(2) <i>The industrial consumer sales in question are primarily matters of local concern, not requiring national uniformity of regulation</i>	10
(a) Whether the local or national interest predominates is a question of fact	10
(b) There is a general local interest in adequate gas supplied at reasonable rates	11
(c) Effective local regulation is impossible if pipe line companies have an uncontrolled right to take industrial customers away from local distributing companies	11
(d) The local interest will be jeopardized if pipe line companies are free to charge discriminatory rates	15

Index Continued.

	Page
(e) The regulation necessary to protect the local interest cannot be administered from the federal level.	18
(f) There is no national interest in having direct industrial sales go unregulated	21
(g) The <i>Attleboro</i> and <i>Baldwin</i> cases distinguished	24
(h) Summary on question of local versus national interest	28
B. The Sale of the Interstate Gas in Question, Being a Sale to an Ultimate Consumer, is Subject to State Regulation Under Authority of the Pennsylvania Gas Company Case.	30
II. DENIAL OF STATE POWER TO REGULATE LOCAL INTERSTATE UTILITY SERVICE WOULD UPSET A LONG STANDING AND WELL CONSIDERED POLICY OF CONGRESS	37
A. The Purpose of Congress in Exempting Industrial Sales From the Natural Gas Act Was to Leave the States Free to Regulate Such Sales	37
(1) <i>Legislative history of Natural Gas Act</i>	37
(2) <i>Judicial discussion of legislative history</i>	47
(3) <i>Panhandle's reference to Report No. 800, 80th Congress</i>	49
(4) <i>Panhandle's reference to an amendment presented for the Association at the hearing on the Rizley Bill, H. R. 2185.</i>	54
B. The Natural Gas Act Accords With the Long Standing Policy of Congress Respecting State Jurisdiction	58
C. A Denial of State Jurisdiction in this Case Would Constitute a Far-Reaching Precedent Adverse to Effective Regulation of All Local Utility Service	59
CONCLUSIONS	60

Index Continued.

iii

AUTHORITIES.

COURT DECISIONS:

Page

Baldwin v. Seelig, 294 U. S. 511.....	24, 26, 27
Colorado Interstate Gas Company v. Federal Power Commission, 324 U. S. 581.....	34, 47
Colorado-Wyoming Gas Company v. Federal Power Commission, 324 U. S. 626.....	47
Connecticut Light & Power Company v. Federal Power Commission, 324 U. S. 515.....	26
Cooley v. Port Wardens, 12 How. 299, 319, 13 L. ed. 996, 1005.....	7
East Ohio Gas Company v. Tax Commission, 283 U. S. 465.....	30, 33, 34
Federal Power Commission v. Hope Natural Gas Company, 320 U. S. 591.....	6, 34, 49
Illinois Natural Gas Company v. Central Illinois Public Service Company, 314 U. S. 498.....	34, 36
Jersey Central Power & Light Company v. Federal Power Commission, 319 U. S. 61.....	26, 34, 36
Long Star Gas Company v. Texas, 304 U. S. 224.....	31
Milk Control Board v. Eisenberg Farm Products, 306 U. S. 346.....	17, 18, 27
Minnesota Rate Cases, Simpson v. Shepherd, 230 U. S. 352.....	5, 7, 19, 28, 31
Missouri ex rel. Barrett v. Kansas Natural Gas Company, 265 U. S. 298.....	24, 35
Panhandle Eastern Pipe Line Company v. Federal Power Commission, 324 U. S. 635.....	47
Parker v. Brown, 317 U. S. 341.....	18, 28, 29
Pennsylvania Gas Company v. Public Service Com- mission, 252 U. S. 23.....	6, 25, 30, 31, 32, 33, 34, 35, 36
Port Richmond etc. Ferry Company v. Board of Chosen Freeholders, 234 U. S. 317.....	29, 30
Prudential Insurance Company v. Benjamin, 328 U. S. 408.....	6, 10, 61
Public Utilities Commission v. Attleboro Steam & Electric Company, 273 U. S. 83.....	24, 25, 26, 35
Public Utilities Commission v. Landon, 249 U. S. 236.....	30
Public Utilities Commission v. United Fuel Gas Company, 317 U. S. 456.....	6, 48
Robertson v. California, 338 U. S. 440.....	10, 17
South Carolina State H. Department v. Barnwell Bros., 303 U. S. 177.....	8, 28
Southern Pacific Company v. Arizona, 325 U. S. 761.....	8, 10, 22, 28

	Page
United Fuel Gas Company v. Railroad Commission, 278 U. S. 300	35
United States v. United Mine Workers of America, 67 S. Ct. 677	51
United States v. Wrightwood Dairy Company, 315 U. S. 110	52
Wilson v. Black Bird Creek Marsh Company, 2 Pet. 245, 7 L. ed. 412	7

STATUTES:

Communications Act of 1934	6, 58
Federal Power Act of 1935	6, 26, 58
Natural Gas Act	9
Public Utility Act of 1935	37
Burns Indiana Statutes, Annotated, 1933 Secs. 54- 112, et seq.	11
California Agricultural Prorate Act of 1938	28

MISCELLANEOUS:

Bills and Resolutions

S. R. 83—70th Congress	37
H. R. 5423—74th Congress	37
H. R. 11662—74th Congress	37, 38, 39, 40, 45, 46, 47
H. R. 12680—74th Congress	40
H. R. 4008—75th Congress	40, 42, 45
H. R. 6586—75th Congress	36, 42, 43, 44, 50
H. R. 2185—80th Congress	24, 54, 55
H. R. 4051—80th Congress	50, 51, 53
Report No. 2651—74th Congress, 2d Session	40
Report No. 709—75th Congress, 1st Session	36, 43, 52
Report No. 1162—75th Congress, 1st Session	44
Report No. 800—80th Congress, 1st Session	49
Printed House Hearings on H. R. 11662, 74th Congress	38, 39, 45, 46, 47
Printed House Hearings on H. R. 4008, 75th Congress	41, 42
Congressional Record, Vol. 81, Part 6, page 6721	44
Congressional Record, Vol. 83, page 8347	45
Congressional Record, July 11, 1947	51
Federal Utility Regulation, Annotated (1943) Public Utilities Reports Inc.	37
Harvard Law Review, Vol. LVIII, No. 7, 1945	60
NARUC Annual Proceedings. 1929	58

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OPINION BELOW.

The opinion of the Supreme Court of Indiana is reported in 71 N. E. (2d), page 117.

PRELIMINARY STATEMENT.

The National Association of Railroad and Utilities Commissioners, hereinafter called the Association, is a voluntary association embracing within its membership the members of the regulatory commissions and boards of the several states of the United States, except two, one of which has no state regulatory commission.

By the Constitution of the Association the President or the Executive Committee of the Association may direct the General Solicitor to appear on behalf of the Associa-

tion (as distinguished from a particular commission represented in its membership) in any proceeding pending before any court or commission in which, in the judgment of such President or Committee, appearance on behalf of the Association should be made. This brief is offered for filing on behalf of said Association by direction of the President and of the Executive Committee in the general public interest.

The interest of the Association in this case arises by reason of the fact that the primary issue is whether the Indiana Public Service Commission, hereinafter called the Commission, is precluded by reason of the Commerce Clause of the Constitution, from regulating direct sales to industrial consumers situated in Indiana by an interstate natural gas pipe line company.

If, by reason of the Commerce Clause, such regulation is held invalid in Indiana, the decision will serve as a precedent for a like ruling in other states served by Panhandle Eastern Pipe Line Company, hereinafter called Panhandle, and other pipe line companies. More than this, if the order in question is not sustained, a hiatus in regulation will be immediately created, for sales to industrial consumers are expressly exempt from federal regulation under the Natural Gas Act. In the opinion of this Association, a hiatus in regulation, whereby a phase or segment of public utility operations is enabled to escape all regulation, is not in the public interest.

The Association has participated, as *amicus curiae*, in the prior proceedings herein, by filing a brief in the Supreme Court of Indiana and by filing a brief and participating in the oral argument before the trial court.

STATEMENT OF THE CASE.

This proceeding involves the validity of an order of the Commission, dated November 21, 1945, requiring Panhandle to file with the Commission certain tariffs, annual reports, and accounting data.

The Commission order under review was rendered in a proceeding begun by the Commission, on its own motion, on October 13, 1944. The purpose of the proceeding was to determine whether Panhandle is failing or has failed to comply with, abide by and conform with any applicable provisions of the Public Service Commission Act or the orders and regulations of the Commission. In particular, the inquiry was directed to an investigation of the facts and circumstances surrounding Panhandle's sale of natural gas to the Anchor-Hocking Glass Corporation, hereinafter called Anchor-Hocking, an industrial consumer of natural gas within the State of Indiana.

Hearings were held in November, 1944, and January and March, 1945. The evidence showed that approximately 112,000 consumers in Indiana are supplied with gas which is transmitted into that state, by Panhandle, from the Amarillo Gas Field in the Texas Panhandle and the Hugeton Gas Field in southwestern Kansas. At the time this proceeding was pending before the Commission, the company was making direct sales to seven employees for domestic use, and to Anchor-Hocking, for its own industrial use. All other sales in Indiana by Panhandle, at that time, were sales to local distributing companies and municipalities, for resale to ultimate consumers. The 112,000 consumers referred to above receive Panhandle gas through these local distributing companies. (R. 46). At the time of the Commission proceeding, Panhandle had entered into arrangements to provide direct industrial service to a plant operated by E. I. Du Pont de Nemours near the Town of Fortville, Indiana. (R. 46). This arrangement was consummated subsequent to entry of the Commission order and hence was not dealt with in the Commission order and is not involved in this court review. Except for domestic sales to seven employees, Anchor-Hocking was the only ultimate consumer receiving direct service from Panhandle in Indiana during the pendency of the Commission proceedings. Anchor-Hocking is en-

4

gaged in manufacturing glassware. Nine other manufacturers of glass obtain their supply of natural gas from Central Indiana Gas Company, one of the distributing companies served by Panhandle. (R. 48)

The stipulated evidence also shows that it is the purpose and intention of Panhandle in the future to make contracts for supplying gas to large industrial consumers direct with such consumers. These industrial consumers are now served by distributing companies which obtain their supply, for residential, commercial and industrial distribution, from Panhandle. Not taking into account the industrial customers indirectly served by Kentucky Natural Gas Corporation, 252 industrial customers are served by the distributing companies dependent upon Panhandle for their supply. (R. 50) Panhandle believes sales to these industrial customers to be free from all regulation, federal or state.

If Public Service Company of Indiana, one of the distributing companies in question, were to lose all of the gas revenues classified as industrial sales, by reason of Panhandle taking over this business, it would mean a loss of more than \$1,000,000 annually in gross revenues, and a loss in net operating income, before federal income taxes, of \$293,730.22 annually. This would require a substantial increase in the distributing company's domestic and commercial rates. (R. 144)

In the case of another distributing company, Central Indiana Gas Company, loss of its industrial customers would reduce net revenues by \$514,206.67 annually, necessitating a substantial increase in Central's domestic and commercial rates. The same result would follow if Kokomo Gas & Fuel Company, another distributing company, were to lose its industrial customers to Panhandle. (R. 146)

Panhandle sought a review of the Commission's order, referred to above, by the Randolph Circuit Court upon the ground that the company was not subject to the jurisdiction of the Commission. That Court, on May 11, 1946, entered judgment vacating, setting aside and perpetually

enjoining enforcement of the Commission order. The Court based its judgment upon the ground that the Commission order unlawfully regulates and burdens interstate commerce, contrary to Article I, Section 8(3), of the Constitution of the United States.

Upon appeal to the Supreme Court of Indiana, the judgment of the trial court was reversed.

THE QUESTION PRESENTED.

Assuming Panhandle's direct sales to industrial consumers to be interstate in character, does state regulation thereof violate the Commerce Clause?

SUMMARY OF ARGUMENT.

I. (Pages 7 to 36). The states are free, in so far as the Commerce Clause is concerned, to make laws affecting or regulating interstate commerce, provided Congress has not acted to prevent such state regulation; and provided the subject matter of the regulation is primarily a matter of local concern not requiring national uniformity. *Minnesota Rate Cases*, *Simpson v. Shepherd*, 230 U. S. 352, 399. Congress has not acted to prevent state regulation of direct industrial sales by interstate pipe line companies.

The facts of the instant case show that the industrial consumer sales in question are primarily matters of local concern, not requiring national uniformity of regulation. Panhandle is carrying out a definite plan to take over most of the industrial consumers now served by local distributing companies dependent upon Panhandle gas. This jeopardizes the efficient, non-discriminatory and economical operation of local distributing companies to the detriment of the general public receiving service from such companies. If this may be done by Panhandle, it may be done by any interstate gas utility company anywhere, and effective state regulation of the business of supplying gas to the public becomes impossible. The local public inter-

est, accordingly, requires that such direct sales be regulated.

This regulation cannot be well administered from the federal level. Moreover, there is no national interest in having direct industrial sales go unregulated. Cases relied upon by Panhandle as precluding state regulation under such circumstances are clearly distinguishable. State regulation of interstate sales to ultimate consumers was sanctioned in *Pennsylvania Gas Company v. Public Service Commission*, 252 U. S. 23.

II. (Pages 37 to 60). It has been the long-standing and well-considered policy of Congress to permit the states to regulate local interstate utility service. This was the purpose of Congress in exempting industrial sales from federal regulation, as revealed by the legislative history of the Natural Gas Act. *Public Utilities Commission v. United Fuel Gas Company*, 317 U. S. 456; *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591. This accords with the similar purpose of the exemption provisions contained in the Communications Act of 1934 and in the Federal Power Act. If Panhandle's contention as to the effect of the Commerce Clause is valid, then state regulation of direct sales and services rendered across state lines is inhibited, not only as to gas, but as to electric energy and to telephone exchange service and as to every other character of local utility service so rendered. The Supreme Court has never heretofore failed to sustain state regulation of sales to ultimate consumers of whatever kind or character. The tendency of the later decisions is especially pronounced in this direction. *Prudential Insurance Company v. Benjamin*, 328 U. S. 408.

ARGUMENT.

I.

Panhandle's Direct Sales to Industrial Consumers Are Subject to State Regulation Even Though Assumed to Constitute Interstate Commerce.

- A. *Such Sales May Be Regulated Under the Principle That, Where the Subject Matter of Regulation is Primarily a Matter of Local Concern Not Requiring National Uniformity, the States May, in the Absence of Conflicting Federal Legislation, Make Laws Affecting or Regulating Interstate Commerce.*

(1) THE BASIC CONSTITUTIONAL PRINCIPLE.

The Commerce Clause does not prohibit all state regulation of interstate commerce. A long line of Supreme Court decisions, beginning with Chief Justice Marshall's opinion in *Wilson v. Black Bird Creek Marsh Company*, 2 Pet. 245, 7 L. ed. 412, rendered in 1829, and followed in the leading case of *Cooley v. Port Wardens*, 12 How. 299, 319, 13 L. ed. 996, 1005 (1851), has established beyond question the right of the states, under certain circumstances and notwithstanding the Commerce Clause, to make laws affecting or regulating interstate commerce.

The existence of this right and the circumstances under which it may be exercised are clearly stated in this frequently-quoted declaration by Mr. Justice Hughes, later Chief Justice, in the *Minnesota Rate Cases*, *Simpson v. Shepherd*, 230 U. S. 352, 399 (1913):

"... It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise

of its authority overrides all conflicting state legislation. (citing cases)"

This principle has been reasserted and applied in Supreme Court decisions too numerous to cite. Through the years, the rule has lost none of its original significance, as was well illustrated by the application thereof in *South Carolina State H. Department v. Barnwell Bros.*, 303 U. S. 177 (1938), where the Court, in holding constitutional a state statute prescribing motor truck length, width and weight limitations said:

"While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. Ever since *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. ed. 412, and *Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints." (p. 185)

This same principle was last repeated by the Supreme Court no longer ago than June, 1945, when the late Chief Justice Stone, in *Southern Pacific Company v. Arizona*, 325 U. S. 761, after repeating almost exactly the above-quoted language of the *Barnwell* case, added:

"... When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation

has been generally held to be within state authority. (citing cases)" (page 767)

The Court below, after a review of the authorities, gave full recognition to this basic constitutional principle. The Court said:

"But we need not decide whether the Anchor-Hocking business and prospective sales direct to other large industrial consumers are interstate or intrastate by mechanical standards. Even if they are interstate they still may be subject to state regulation under some circumstances. It has long been established that the power of Congress over interstate commerce is not exclusive. If the Federal Government has not elected to exercise its power under the commerce clause, and if the transaction is not of such nature as to require uniform regulation on a national basis, and if it is so local in its nature and implications that local needs outweigh national interest, then even though interstate, according to mechanical tests, the state may intervene and regulate (citing cases)." (R. 201, 71 N. E. (2d) 117, 222.)

It is plain that the states are free, in so far as the Commerce Clause is concerned, to make laws affecting or regulating interstate commerce, provided Congress has not acted to prevent such state regulation, and provided the subject matter of the regulation is primarily a matter of local concern not requiring national uniformity.

Congress has not acted to prevent state regulation of direct industrial sales, either by providing for federal regulation or by exempting such sales from state regulation. Section 1(b) of the Natural Gas Act expressly excludes industrial sales from federal regulation and nowhere in that Act or any other federal statute is state regulation of such sales prohibited.

The only remaining question, therefore, is whether such industrial sales are primarily matters of local concern within the meaning of the constitutional principle referred to above.

(2) THE INDUSTRIAL CONSUMER SALES IN QUESTION ARE PRIMARILY MATTERS OF LOCAL CONCERN NOT REQUIRING NATIONAL UNIFORMITY OF REGULATION.

(a) Whether the local or national interest predominates is a question of fact.

Whether a particular subject matter of state regulation is primarily a matter of local concern is almost wholly a question of fact, to be determined by weighing all the practical considerations which argue for and against such a conclusion. The function of the courts in this regard was well stated in the very recent case of *Prudential Insurance Company v. Benjamin*, 328 U. S. 408, decided June 3, 1946, which, with its companion case of *Robertson v. California*, 338 U. S. 440, decided the same day, sustained both state taxation and regulation of interstate insurance business. In the *Prudential* case, the court made this very clear statement:

"...concurrently with the broadening of the scope for permissible application of federal authority, the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsistent with Congress' unexercised power over commerce, and to doing so by a new, or renewed, emphasis on facts and practical considerations rather than dogmatic logic. These facts are of great importance for disposing of such controversies. For in effect they have transferred the general problem of adjustment to a level more tolerant of both state and federal legislative action." (page 420)

Much the same view was expressed in *Southern Pacific Company v. Arizona*, *supra*, where the court said (page 770):

"... in their application state laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed judgment. *Terminal R. Assoc. v. Brother-*

hood of R. Trainmen, *supra*. (318 U. S. 8 . . .); Southern Ry. Co. v. King, 217 U. S. 524 . . ."

We turn, then, to a consideration of the "revelant factual material" which will afford a basis for judging whether the local or national interest predominates here, and, accordingly, whether state regulation is, or is not, compatible with the Commerce Clause.

- (b) There is a general local interest in adequate gas supplied at reasonable rates.

At the outset we know that it is a matter of local concern to the people of Indiana that natural gas be provided for their domestic, commercial and industrial uses in adequate quantities and at reasonable and non-discriminatory rates. This is the purpose behind the Indiana statutes authorizing the regulation of gas utilities (Secs. 54-112, et seq. Burns Indiana Statutes Annotated, 1933), just as in the case of all other state utility regulatory statutes.

- (c) Effective local regulation is impossible if pipe line companies have an uncontrolled right to take industrial customers away from local distributing companies.

The local public interest will be adversely affected, and the purposes of general regulatory statutes thwarted, if direct sales by interstate pipe line companies to industrial consumers are exempt from state regulation, and, at the same time, are unregulated by the federal government. This is because the character of the gas industry is such that it requires regulation in the public interest in its entirety. It is impossible to protect the public interest by regulation extending to a part only. To avoid wasteful duplication in facilities and services, and to promote economical and efficient operation, in a given area, the public good may require that a particular utility shall be given a monopoly to serve customers, and that any other

utility seeking to serve in the same area shall be denied authority altogether, or granted only limited authority, on terms consistent with the public interest.

Recognition of this principle underlies the provision of law governing the granting of certificates of convenience and necessity under federal law and under state laws. Regulation of engagement in business demands regulation as to all. It simply cannot be administered in such a way as to protect the public interest unless it extends to the whole business. The intrastate part cannot be regulated, and the interstate part left free, because the unregulated operators will eat up the choicest business of the regulated operators, by low rates made to secure that business, leaving to the regulated operators only the least profitable customers. Inevitably, losses to such regulated customers must be covered by rates imposed upon the general public.

There is no escape from the conclusion that the public interest imperatively requires regulation of the engagement in the business of selling to consumers by some government, either state or federal. As to the interstate business, regulation might be undertaken by the federal government, but it would be difficult, and less satisfactory than if supplied by state authorities regulating the intrastate business. Regulation, however, is indispensable, and until supplied by the federal government must be supplied by the state, unless the public interest is to suffer, and state regulation of intrastate business is to be broken down, or handicapped and impeded, and made to produce in equitable results.

This is the very situation presented in the instant case, and is why local gas distributing companies have intervened. Panhandle definitely plans to take over most of the industrial consumers now served by distributing companies dependent upon Panhandle gas. Its acknowledged purpose in pursuing this plan is to escape all regulation as to industrial sales. The accomplishment of this plan

will adversely affect the stability of the connecting distributing companies and will be unavoidably reflected in higher domestic and commercial gas rates for service to 112,000 Indiana consumers.

The efficient and economical operation of local distribution systems is necessarily dependent upon the maintenance of a proper balance between its domestic, commercial and industrial customers. The large quantities of gas purchased by industrial customers provide a substantial and indispensable part of the gross revenue of any such local distribution system. With this revenue, such distribution systems have the financial means and stability to render more adequate and less expensive service to domestic and commercial customers than would otherwise be possible. Deprived of their industrial customers, local distribution systems would be crippled in serving their remaining customers, or compelled to serve them at much higher rates.

The Commission made full findings to this effect on this precise point, saying, in its Order: (R. 145)

"The fact that the distributing companies served natural gas to all three classes of gas consumers, i.e., industrial, commercial and domestic, has made possible a high standard of service at lower rates to the consumers in each of the three classes than would have been possible if only one of the classes had been served. It has meant that the residential and commercial consumers have had the benefit of natural gas which would have been denied them unless the distributing companies' business had included service to all three classes of consumers. The installation of facilities to serve industrial consumers has made possible the development of domestic uses, including cooking and water heating, the high B. T. U. gas for house heating and the use of gas for commercial cooking purposes by restaurants, hotels and others. All of these services under old methods were prohibitive in cost or the gas was not available in the quantities in which the customers wished to use it, due to the inadequacy of facilities and of the supply of gas. It was through the development by the distributing companies of the

industrial business that they have been able to improve materially the over-all load factor of gas purchases. This has also enabled the distributing companies to spread their fixed costs, such as interest, taxes and depreciation, which are constant in every-day operation, over a larger number of units of service, which automatically has given the benefit of that condition and fact to each of the three classes of consumers and has made possible the development of rates for service which were attractive not only to one of the three classes but to each of them; all of which has had the effect of promoting greater public interest in the area served by these distributing companies in the use of natural gas and in advancing the public welfare in those areas. (Pages 60, 61, 63, 75, 82 of Transcript.)"

The adverse effect which reduced industrial sales would have upon domestic and commercial customers was clearly recognized in the opinion of the Court below, where it was said:

"... Local utilities whose costs per unit of gas have been increased by the reduced volume of sales caused by the direct deliveries from the pipe lines will be entitled to higher rates and resulting price disparity unfavorable to customers of the local utilities will tend to break down the state system of regulation which will have fixed, and appear to be responsible for, the unfavorable local rates. This probable result, it seems to us, in (is) a weighty consideration in balancing national interest against local need." (R. 208, 71 N. E. (2d) 117, 125)

By regulating direct industrial sales, the local interest of the public can be protected from the ill effects which would result if interstate pipe line companies were free to reach in and grab industrial customers away from the local distributing companies serving that area. This does not mean that all direct service by pipe line companies to industrial plants would be arbitrarily prohibited. It means only that before a pipe line company could take over such

an industrial customer, the Commission would have an opportunity to determine whether such a course would be inimical to the local public interest, and to grant or deny the application according to such determination.

(d) The local interest will be jeopardized if pipe line companies are free to charge discriminatory rates.

Nor does the local concern in regulating sales to industrial consumers end when it is determined what company should render such service. Industries served by a pipe line company may be in direct competition with other industries in the same locality being served by a local distributing company. How can the local public interest in maintaining non-discriminatory rates be achieved, if a pipe line company is free to render service to an industrial plant on a basis or at rates which are unduly preferential to that plant and unreasonably prejudicial to the competing plant? Similar discriminations between two plants within the same state, served by the same or different pipe line companies, would likewise be wholly beyond remedy, if the state is to be denied the power to regulate such sales.

The importance of this consideration was forcibly pointed out in the opinion of the Court below, where it was said:

"... The State of Indiana, in its scheme of utility regulation, controls sales to all other consumers of gas brought into Indiana through interstate pipe lines. The sales by local distribution utilities are regulated by the state. The record shows that many industrial consumers are thus provided with natural gas from exactly the same source. If sales to some are regulated by the state and others are free from regulation confusion is natural.

"Also if Indiana may not regulate the sale of natural gas from interstate pipe lines direct to large industrial consumers in Indiana, such sales and deliveries will not be regulated at all under present law. The result will not only be that the pipe line owners, free of regulation, will have advantage over regulated local utili-

ties in competing for business from large industrial consumers, but the customers of the pipe line may be given advantage over the customers of the local utilities. . . ." (R. 208, 71 N. E. (2d) 117, 125)

It, of course, can be argued that industrial plants located in Indiana also compete with industries in other states, and that there is no way to prevent discriminatory treatment as between two industries served by the same pipe line company where one of such industries is located in another state. Assuming this to be true, it does not constitute a sound reason why the state should not provide nondiscriminatory conditions within its own territory.

Such discrimination between citizens of different states by a company rendering service across state lines is likewise possible, to the same extent, in cases where gas or other utility service is rendered to competing wholesale or retail merchants, or competing farmers, or other competing customers, receiving service under established commercial or domestic rates,—and yet sales for commercial or domestic services are admittedly of such local character as to be subject to state regulation, when not regulated by Congress, notwithstanding the service may be rendered across state lines.

If the prevention of discrimination as between competing industries located in different states becomes important enough, Congress can always vest the federal regulatory agency with power to deal with the situation. If and when Congress does so, conflicting state regulation will be superseded. Unless and until Congress does so, the states should be free to meet the problem of discrimination and prejudice within their own borders.

In this connection it is especially important to bear in mind that local regulation of direct industrial sales is necessary not only to protect the customers receiving such industrial service, but also, and more important, to make possible adequate and effective regulation of local distribution service to all of the general public in the same area.

Stated differently, the proposed state regulation of direct industrial sales, now under review, while affecting interstate commerce, is only incidental to a general plan of local intrastate regulation. In such cases the Supreme Court has uniformly sustained the regulation as a matter of local concern not requiring national uniformity. The basis for this reasoning lies in the fact that a general plan of local regulation will often be completely defeated if it is not permitted to control incidental interstate phases which may be involved.

The application of this principle was well stated in the recent *Robertson case*, *supra*, where the court said:

"Furthermore, here, as in the cited cases, 'unless some measure of local control is permissible,' the activities and their attendant evils 'must go largely unregulated,' unless or until Congress undertakes that function. *California v. Thompson*, *supra* (313 U. S. at 115, 85 L. ed. 1222, 61 S. Ct. 930). And in view of the well-known conditions of competition in this field, such a result not only would free out-of-state insurance companies and their representatives of the regulation's effect, thus giving them advantages over local competitors, but by so doing would tend to break down the system of regulation in its purely local operation." (p. 449, U. S.)

A similar view is stated in *Milk Control Bd. v. Eisenberg Farm Products*, 306 U. S. 346 (1939). In this case the Court, in affirming a Pennsylvania statute which resulted in the regulation, among other things, of the business of buying milk solely for transportation in interstate commerce, said:

"If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable. There is, therefore, a comparatively large field remotely affect-

ing and wholly unrelated to interstate commerce within which the statute operates. These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress." (p. 353, U. S.)

As in the *Eisenberg* case there is in the instant case, a "comparatively large field remotely affecting and wholly unrelated to interstate commerce" within which the Indiana statutes operate. These statutes set up a general plan of local regulation and are not directed primarily at interstate utility operations. Nevertheless, the general plan of local regulation would be, as heretofore pointed out, seriously crippled if held to be inapplicable to industrial sales by interstate pipe line companies. Under such circumstances the local interest is plainly predominant and the national interest is negligible or non-existent. When this is the case, the courts have not hesitated to validate the exercise of state authority. This is simply an application of the principle that:

"... the reconciliation of the power thus granted (to the Federal government under the Commerce Clause) with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved..." (*Parker v. Brown*, 317 U. S. 341, 362 (1943)).

(e) The regulation necessary to protect the local interest cannot be administered from the federal level.

These public interests which would be adversely affected if states are to be denied the right to regulate direct industrial sales, are essentially matters of local concern to the people of Indiana, particularly those people living in the service areas in question. It is vital to them, and not to the people of other states or the nation as a whole, that gas be supplied at reasonable and non-discriminatory rates

and that the distribution systems serving local areas be not undetermined by the snatching of industrial customers in the manner proposed by Panhandle.

Not only are these matters of local concern, but they are matters which, by their very nature, admit of "diversity of treatment according to the special requirements of local conditions" (to use the language of Mr. Justice Hughes, in the *Minnesota Rate cases* quoted above), and in fact are matters not susceptible of uniform national regulation at the federal level.

The problems arising from the sale of natural gas to consumers, domestic, commercial and industrial, vary widely from state to state, and from company to company. What regulatory laws are necessary, and what commission policies are necessary in administering those laws, is obviously dependent upon the local conditions in each state.

It is not necessary to elaborate upon the practical difficulties which would be involved if Congress attempted to deal with these local and varying problems on a national basis. The best evidence of the existence of these practical difficulties is that Congress, having before it the problem of regulating the natural gas industry, deliberately chose to exempt industrial sales from federal regulation.

On this phase of the case, the opinion of the Court below is especially pertinent. The Court said:

"We seem to have all the prerequisites to state intervention. Congress has not elected to exercise its power under the commerce clause. Uniformity in control of direct sales from interstate pipe lines to large industrial consumers does not seem to be necessary. There is nothing in the record to indicate that it is. Conditions will differ from area to area and the varying needs will be met by varying procedures. Furthermore, the fact that there has been no uniformity, so far as the record shows, up to this time, and the additional fact that Congress rather deliberately left regulation of such sales out of its regulatory scheme are also indicative that uniformity is not necessary, or at least that Congress did not believe it to be necessary.

... It would also seem that Congress did not believe the national interest in the regulation of such business outweighed local needs, and the logic of the situation seems to support such position." (R. 207, 71 N. E. (2d) 117, 125)

Congress, in following this course, was merely conforming to its long standing policy of leaving consumer utility sales and service to state regulation even where such sales actually constitute interstate commerce.

The federal government can and does, under the Natural Gas Act, set the wholesale price at which interstate pipe line companies sell natural gas to local distributing companies. In so doing the Federal Power Commission is principally concerned with the financial condition and operating problems of the pipe line company, and it must also take into account, in a general way, the over-all requirements of local distributing companies and industries served by the pipe line company, and the right of the public that such distributing companies shall obtain their supply of gas at reasonable rates.

But the federal agency, in setting these interstate wholesale rates, is not required to make a detailed study of the rate structure applicable to consumers of all classes in the many cities and towns receiving interstate gas, with the purpose of requiring a fair distribution of total cost,—but operating cost and cost of return on capital,—as between such classes of service. It is not required to analyze the financial position of local distributing companies. It is not required to weigh the relative needs of the several classes of consumers in each such city or town. It is not required to determine the effect of competing fuels upon the industrial-consumer rate. It is not required to consider the relationship between the pipe line company and the local distributing company. Yet all of these factors are involved in the regulation of rates and service to industrial consumers located in these cities and towns.

Hence it is obviously absurd to conclude that, because it has been found practicable to regulate interstate wholesale rates and service from the federal level, this would also be true with respect to the industrial consumers located within local service areas. The problems involved in regulating the sale of natural gas to such industrial consumers are inextricably interwoven with the problems involved in regulating all other consumer sales in the same service area. The regulatory agency which regulates consumer sales in general must, therefore, be the agency to regulate sales to industrial consumers. There is no practicable way of dividing this function of government between the state and federal levels.

From what is said above it is reasonable to conclude: (1) that regulation of direct industrial sales is necessary to assure adequacy of supply and reasonableness of price of natural gas sold to the consuming public; (2) that these are primarily matters of local rather than national concern; and (3) that such regulation admits of, and in fact requires, diversity of treatment as between the states, and would be wholly impracticable at the federal level.

(f) There is no national interest in having direct industrial sales go unregulated.

But some arguments have been advanced to the effect that, despite this local interest and inability to safeguard it through federal regulation, there is a predominant national interest in having direct industrial sales go wholly unregulated.

The principal argument of this kind is based upon the very obvious fact that it is in the national interest that pipe line companies be not regulated by any state or locality in such a way as to interfere with their operations in the other states in which they serve. It is said that, if each state may regulate direct industrial sales consummated within its borders, a pipe line company serving several states may be confronted with a variety and conflict

of regulation that will create an impossible situation. Specifically it is suggested that one state may require the pipe line company to deliver to industrial customers in that state an unfairly large proportion of the company's gas supply, and that one state may fix rates on industrial sales which will unduly burden the pipe line company in its operations in other states, and rates which may produce gross inequities as between industrial consumers situated in different states.

The most obvious answer to all of these suggestions is that they are—just suggestions. They are not based upon facts of any kind or character. State regulation of direct industrial sales has only recently become important and hence has only recently received active attention by the states. Up to this time there is no vestige of evidence that any of the dire results predicted by the opponents of state regulation, will ever materialize. If they do materialize the courts will be free to reexamine the question in the light of the proven facts, and to determine whether constitutional rights are being violated: and Congress may at any time meet any situation hurtful to the national interest by providing for federal regulation, or by expressly forbidding state regulation. In *Southern Pacific Company v. Arizona*, *supra*, the Supreme Court, in holding unconstitutional an Arizona train-limit law, did not base its conclusions upon what might possibly happen if that state regulation were permitted to stand, but upon a large accumulation of evidence as to actual experience and results with that state regulation.

The fact that state regulatory power may conceivably be exercised in such a manner as to be injurious to interstate commerce, or to the citizens of another state, is no argument against the existence of the power. When the same company serves the public in domestic and commercial service in localities located in different states it is unquestionable that each state has the power to regulate such services within its borders, including the rates therefor.

And it is manifest that by a misuse of that power in fixing rates, or by requiring an extension of services to areas not before served, and beyond the capacity of the company to serve (consistently with its service in other states) the same character of inequities would be created which are suggested as possible in the industrial field. Yet the possibility of such misuse of power has never been held to invalidate state regulation of domestic and commercial service by a company rendering such service in more than one state.

It is a serious thing for the courts to throw out, as unconstitutional, a state statute which admittedly serves a very important local need. It should only be done where actual experience shows this course to be essential to the national welfare. It should never be done, we earnestly urge, upon the basis of pure assumption and speculation.

It should be remembered, too, that the question here is not state regulation versus federal regulation. It is state regulation versus *no* regulation. It is therefore pertinent to inquire whether the danger of one state being discriminated against as to its gas supply or rates is greater under state regulation than it would be with no regulation. State officials have demonstrated in innumerable ways and over a long span of years, their disposition and ability to co-operate in solving problems involving multi-state utilities and carriers. What reason is there to believe that these public officials will have the national interest at heart to a less degree than the managers of the pipe line companies?

Moreover, if a state commission should attempt to set a rate or prescribe service requirements which would place an unfair and unreasonable burden upon the company's system and operations in other states, the company has a complete and adequate remedy under the 14th Amendment of the Constitution.

Had there been a national interest in assuring that direct industrial sales would go entirely unregulated by any agency, state or federal, Congress would have made this

clear when it passed the Natural Gas Act, by expressly forbidding state regulation. As a matter of fact, Congress understood that the states had authority to regulate such sales, in the absence of federal legislative action, as will be pointed out in a subsequent section of this brief. Yet Congress did nothing to preclude the states from exercising that authority when and as local interest required.

Finally, it is beyond comprehension how there could be a great national interest in freeing direct industrial sales of all regulations, while industrial sales of much greater importance and magnitude, made through the pipes of local distributing companies, have at all times been subject to state regulation. Only five per cent of all industrial sales, by volume, are made by interstate pipe line companies, according to an estimate of counsel for the Independent Natural Gas Association, as appears from a statement placed before the Committee at the hearing on H. R. 2185, later referred to at page 57, of this brief.

(g) The *Attleboro* and *Baldwin* cases distinguished.

In its opening brief herein, Panhandle relies principally upon two United States Supreme Court decisions, *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927), and *Baldwin v. Seelig*, 294 U. S. 511 (1935), to support its view that the states may not, for the purpose of protecting the local public interest, provide regulation, applicable to interstate commerce, of the character here in issue.

Referring first to the *Attleboro* case, it is plain that this case did not involve direct industrial sales, but rather, sales for resale, which class of sales had already, in the earlier case of *Missouri ex rel. Barrett v. Kansas Natural Gas Company*, 265 U. S. 298 (1927) been held to be essentially national in character. The United States Supreme Court has never held direct industrial sales to be essentially national in character—that is the very question in issue in this case.

To say that the *Attleboro case* is authority here is simply to beg the question by assuming that direct industrial sales are essentially national in character.

The *Attleboro case* involved the right of the Rhode Island Commission to increase the interstate wholesale rates which a Rhode Island utility, Narragansett Electric Lighting Company, charged a Massachusetts distributing company, Attleboro Steam & Electric Company, for delivery of electric energy at the state line for exportation from the state. The Rhode Island Commission asserted that regulation of the wholesale rate was necessary in order to protect the interest of local consumers in Rhode Island. The Court held against this contention, saying:

"It is clear that the present case is controlled by the Kansas Natural Gas Company case. The order of the Rhode Island Commission is not, as in the Pennsylvania Gas Company case, a regulation of the rates charged to local consumers, having merely an incidental effect upon interstate commerce, but is a regulation of the rates charged by the Narragansett Company for the interstate service to the Attleboro Company, which places a direct burden upon interstate commerce . . ." (p. 89, U. S.)

" . . . Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character. The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress." (p. 90, U. S.)

Thus the *Attleboro case* is authority only for the rule that *interstate sales for resale*, having already been held to be national in character, cannot be regulated by the states for any purpose. It made no ruling on state regulation of sales to industrial consumers and, in fact, pointed out that the *Attleboro* situation differed from that involved in *Pennsylvania Gas Company v. Public Service Commis-*

sion, 252 U. S. 23 (1920), wherein the constitutionality of state regulation of interstate sales to "local consumers" was upheld. It was because of the *Attleboro* decision that Congress, in the Federal Power Act pertaining to electric energy, provided for federal regulation of interstate sales for resale. Federal Power Act of 1935, 49 Stat. 847, c. 687, 16 U. S. C. 824, Section 201 (a)-(e). That Act did not provide for federal regulation of any sales to consumers, including sales to industrial consumers, for it was understood by Congress that the *Attleboro* decision did not disable the states from providing such regulation. This is made clear in *Jersey Central Power & Light Company v. Federal Power Commission*, 319 U. S. 61 (1943), where the Court, in referring to section 201 of the Federal Power Act, states (page 70):

"... Subsections (a) and (b) show the intent to regulate such transactions as are beyond state power under the *Attleboro Steam & Electric Co. Case*, 273 U. S. 83, 71 L. ed. 549, 47 S. Ct. 294, *supra*..."

The same view is expressed in *Connecticut Light & Power Company v. Federal Power Commission*, 324 U. S. 515 (1945) at page 524.

In the *Baldwin* case, also relied upon by Panhandle, the court declared invalid a New York statute prohibiting the sale within the state, of milk brought from another state unless the minimum prices prescribed to be paid to New York producers had been paid to the out-of-state producer.

The facts of the *Baldwin* case bear no recognizable similarity with the facts of the instant case. The purpose of the New York statute was to promote the economic welfare of New York farmers by guarding them against competition with the cheaper prices of other states. To accomplish this the New York statute prohibited any sales of milk within New York, if the seller paid less than a certain wholesale price for the milk in another state (*Vermont in that case*) where he acquired title to the milk.

In the *instant* case there is no purpose to protect local residents, industries or distributing companies as against residents, industries or distributing companies located outside of Indiana. All of the gas used by the local distributing companies in question, and their customers, comes from out-of-state—all of it is brought into the state by Panhandle. State regulation here is only for the purpose of assuring fair treatment *as between the residents of Indiana* by gas utilities in their Indiana operations and of course there is no attempt to dictate what price Panhandle shall pay in some other state for the gas it brings in to Indiana. Should the Commission attempt any *unreasonable* regulation, violative of the 14th amendment or of any other provision of the Constitution, the company has a complete and adequate remedy by an appeal to the courts.

Where, as in the instant case, the effect of state regulation upon interstate commerce, even though direct, is only incidental to a general plan of local regulation, the courts sustain the regulation as a matter of local concern not requiring national uniformity. This point is fully discussed under (d) above. In the *Eisenberg case*, there referred to, the Court, in validating state regulation, distinguished in these words, the *Baldwin case* upon which Panhandle relies:

"In *Baldwin v. G. A. F. Seelig*, . . ., this court condemned an enactment aimed solely at interstate commerce attempting to affect and regulate the price to be paid for milk in a sister state, and we indicated that the attempt amounted in effect to a tariff barrier set up against milk imported into the enacting state."
(page 353, U. S.)

Unlike the circumstances involved in the *Baldwin case*, the Indiana regulatory statutes here in question are not "aimed solely at interstate commerce attempting to affect and regulate the prices to be paid for milk (or gas) in a sister state. . . ." The prime objective of the Indiana

statute is to regulate transactions occurring wholly within the State of Indiana and affecting only the people of Indiana. The application of those statutes to the industrial sales in question is only incidental to that prime objective, but essential to the attainment of it:

(h) Summary on question of local versus national interest.

From what has been said above we respectfully submit that direct industrial sales admit of "diversity of treatment according to the special requirements of local conditions" (*Minnesota Rate Cases*); that such sales "are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress" (*Barnwell case*); that the impact of state regulation of such sales "on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight" (*Southern Pacific case*); and that, accordingly, "the state may act within their respective jurisdiction until Congress sees fit to act." (*Minnesota Rate Cases*).

The case falls squarely within the rule recently announced by the Supreme Court in *Parker v. Brown*, *supra*. In validating a state program adopted for the 1940 raisin crop under the California Agricultural Prorate Act of 1938, the Court there said:

"Such regulations by the states are to be sustained, not because they are 'indirect' rather than 'direct' (citing cases), not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health, and well-being of local communities, and which, because of its local character and the practical difficulties in-

volved, may never be adequately dealt with by Congress . . . " (page 362)

Substantially the same principle was announced in *Port Richmond etc. Ferry Company v. Board of Chosen Freeholders*, 234 U. S. 317 (1914), sustaining state regulation of rates for ferry boat service across the Hudson River. The Court there said:

" . . . It is argued that the mere fact that interstate transportation is involved is sufficient to defeat the local regulation of rates, because, it is said, that it amounts to a regulation of interstate commerce. But this would not be deemed a sufficient ground for invalidating the local action without considering the nature of the regulation and the special subject to which it relates. The fundamental test, to which we have referred, must be applied; and the question is whether, with regard to rates, there is any inherent necessity for a single regulatory power over these numerous ferries across boundary streams; whether, in view of the character of the subject and the variety of regulation required, it is one which demands the exclusion of local authority . . . The practical advantages of having the matter dealt with by the states are obvious . . . " (page 331)

It is no answer to say that the *Parker* case involved raisins and the *Port Richmond* case involved ferry boats, and therefore the principle therein announced cannot be applied to the instant case, which involves pipe line companies. The fact is that the *Parker* and *Port Richmond* cases, as well as the other decisions referred to above, supply a test by which the facts and circumstances of any case can be measured.

The facts and circumstances relative to industrial consumer sales of natural gas as set out above, show beyond doubt that such sales may, to apply the test of *Parker v. Brown*, "appropriately be regulated in the interest of the safety, health and well-being" of the people of Indiana, and that, because of their "local character and the prac-

tical difficulties involved," such sales "may never be adequately dealt with by Congress." Likewise, to apply the test of the *Port Richmond Ferry Company case*, the facts and circumstances of this case plainly demonstrate that there is no "inherent necessity for a single regulatory power" with authority to regulate industrial consumer rates, and that "the practical advantages of having the matter dealt with by the states are obvious."

The foregoing consideration of the court decisions and their application to the relevant facts of this case, clearly establishes that, as a general proposition and without reference to the natural gas and electric utility decisions, the industrial sales in question are matters of local concern fully subject to state regulation. But this Court, in a natural gas case presently to be noticed, has furnished a conclusive authority in support of state power to regulate such sales.

B. The Sale of the Interstate Gas in Question, Being a Sale to an Ultimate Consumer, is Subject to State Regulation Under Authority of the Pennsylvania Gas Company Case.

Pennsylvania Gas Company v. Public Service Commission, *supra*, involved the right of the New York Commission to regulate the sale of gas to ultimate domestic and factory consumers in cities and towns of New York, by a company which had transported the gas by pipe lines from the source of supply in the State of Pennsylvania. There was no interruption in the flow of gas—it was transported without intervention of any sort between the seller and the buyer. It was this circumstance which led the Court to distinguish the case of *Public Utilities Commission v. Landon*, 249 U. S. 236 (1919), and to hold that here, the sales to ultimate consumers constituted interstate commerce. This holding in the *Pennsylvania Gas Company case* was later disapproved in *East Ohio Gas Company v. Tax Commission*, 283 U. S. 465 (1931).

But the *Pennsylvania Gas Company* case announced another ruling which has never been disapproved; which has been consistently followed ever since; and which has a very direct bearing upon the instant case. After quoting at length from the *Minnesota Rate Cases*, *supra*, to the effect that the states may pass laws indirectly affecting interstate commerce, when needed to protect or regulate matters of local concern, the Court said:

"The thing which the state Commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the state of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the state, nevertheless, the service rendered is essentially local, and the sale of gas is by the company to local consumers, who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city."

"This local service is not of that character which requires general and uniform regulation of rates by Congressional action, and which has already been held beyond the power of the States, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest, and has not been attempted under the superior authority of Congress." (page 30)

Here, then, is a holding that consumer sales of natural gas may be regulated by a state, even though they constitute interstate commerce. See also, *Lone Star Gas Company v. Texas*, 304 U. S. 224, 237 (1938).

The consumer sales in question were made as a part of a general local distribution business and by means of pipe lines laid in city streets through which the gas was

transported at reduced pressure. These factors are relied upon by Panhandle as distinguishing the *Pennsylvania Gas Company* case from the instant one involving direct industrial sales. But the general view held by the courts, as will be later developed, appears to be that the controlling factor in the *Pennsylvania Gas Company* case, was not the presence of a city-wide distribution system, or the use of city streets, but, rather, the circumstances that the sales being regulated by the state were sales to *ultimate consumers*.

This general view is also supported by a consideration of the basic constitutional question. That question is whether the subject matter of regulation and the proposed regulation itself, are matters of local concern, or whether they are matters demanding uniform national treatment. In considering that question, of what relevancy is the fact that the gas is transported under reduced pressure? No one has shown that there is a national interest when gas is piped at one pressure but not at another, and conversely, it has not been shown that the existence of a dominant local interest in fixing reasonable consumer rates has any relationship to the pressure in the gas mains.

Likewise, how can it be said that the local interest in consumer rates is directly related to whether or not the pipes are laid in city streets, or whether the seller has a franchise for its pipes, or whether the seller is distributing to an entire city of consumers or only a few? Conversely, can any logical relationship be established between the dominant national interest and the use or non-use of city streets, the existence or non-existence of franchises, the service to a whole city or to only a few consumers?

None of the possible adverse effects of permitting Panhandle to render unregulated service to Anchor-Hocking will be diminished in the least merely because Panhandle will render such service from a direct connection with its pipe line rather than through a local distribution system. Certainly, then, the type of piping system which is utilized

can have no direct bearing upon the question of local interest. It follows from this that the incidental circumstances of the *Pennsylvania Gas Company case*, that service was rendered through a distribution system laid in city streets, is not the controlling circumstances which led the Court to find a dominant local interest and to validate state regulation.

It may be contended that, in the *East Ohio Gas Company case*, the Supreme Court rejected the ruling, in the *Pennsylvania Gas Company case*, that sales of interstate gas to ultimate consumers are subject to state regulation. A careful analysis of the *East Ohio Gas Company case* will expose the fallacy of such a view. The facts of that case show that the State of Ohio had taxed the revenues from local sales of gas made by a utility which supplied the gas to consumers directly from sources outside the state. The company denied the state's power to tax, asserting that the services were interstate in character, and that the revenues therefrom were hence beyond the reach of the taxing power of the state. The *Pennsylvania Gas Company case* was cited as conclusively establishing the interstate character of the commerce.

The Court was then first compelled to make a careful consideration as to whether such sales were in fact properly classifiable as interstate. Its conclusion was that after gas had been brought into a state, and its pressure had been reduced preparatory to sale for local consumption, such gas could not properly any longer be considered as in interstate commerce.

In reaching its conclusion that the local distribution constituted intrastate commerce, the Court, in the *East Ohio Gas Company case*, was forced to disapprove the contrary ruling on this point in the *Pennsylvania Gas Company case*. This it did by saying:

"It does not appear that there were presented, in *Pennsylvania Gas Co. v. Public Serv. Commission*, to the state court or here the considerations on which it is held that interstate commerce ends and intrastate

business begins when gas flowing through pipe lines from outside the state passes into local distribution systems for delivery to consumers in the municipalities served. But, however that may be, the opinion in that case must be disapproved to the extent that it is in conflict with our decision here." (page 472, U. S.)

It will be observed that the Court was careful to disapprove only that portion of the *Pennsylvania Gas Company* decision which held local distribution to be interstate commerce. It did not disapprove the ruling that consumer sales are matters of local concern which may be regulated by the states even if held to be interstate commerce. This is shown by the later citation of the *Pennsylvania Gas Company* case in support of that principle in *Illinois Natural Gas Company v. Central Illinois Public Service Company*, 314 U. S. 498, 505 (1942), and in the dissenting opinion of Mr. Justice Roberts in *Jersey Central Company v. Federal Power Commission*, *supra*, at page 80. The *Pennsylvania Gas Company* case was also cited, without any indication that the ruling in question had been superseded, in the separate opinion of Mr. Justice Jackson in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 651 (1944), and in the Court's opinion in the recent case of *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581 (1945).

In the *Illinois Gas Co.* case, cited above, the Supreme Court, 11 years after the *East Ohio* decision, acknowledged the continued authority of the *Pennsylvania Gas Co.* decision, when it said:

"... Thus, in *Pennsylvania Gas Co. v. Public Serv. Commission* . . . , where natural gas was transported by pipe line from one state into another and there sold directly to ultimate local consumers, it was held that, although the sale was a part of interstate commerce, a state public service commission could regulate the rates for service to such consumers. While the Court recognized that this local regulation would to some extent affect interstate commerce in gas, it

was thought that the control of rates was a matter so peculiarly of local concern that the regulation should be deemed within state power." (page 505)

In the *Jersey Central* case, cited above, Mr. Justice Roberts, discussing in his dissenting opinion, a point which was not contested in the principal opinion, cited the *Pennsylvania Gas Co. case* as authority for this statement:

"There is no dispute concerning the exigency which moved Congress to adopt the statute (Federal Power Act). It had been settled that the transmission and sale of a commodity, such as electricity or gas, produced in one state, transported and furnished directly to consumers in another state, in interstate commerce, did not preclude regulation of the rates to the consumer by the state of delivery." (page 80)

It is worthy of note that in both of these recent references to the *Pennsylvania Gas Co. case*, no mention was made of the fact that the *Pennsylvania case* involved a local distribution system, or that the service to consumers was made by means of pipes laid in city streets. The emphasis was placed entirely upon the fact that the sales were made to *ultimate consumers* in the state of delivery. Thus, clearly, the Supreme Court now interprets the *Pennsylvania Gas Co.* doctrine as applying to sales to any ultimate consumer, including the type of industrial consumer involved in the instant case.

The recent Supreme Court references to the *Pennsylvania Gas Co. case* differ from some of the earlier opinions, where considerable emphasis was placed upon the fact that in the *Pennsylvania case* the local consumers were being served by means of a local distribution system with pipes laid in city streets. See *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, *supra*, page 309, U. S.; and *Public Utilities Com. v. Attleboro Steam & E. Co.*, *supra*, at page 87.

Not all of the earlier cases took this view, however. In *United Fuel Gas Co. v. Railroad Commission*, 278 U. S.

300, 317 (1929), the *Pennsylvania Gas Co. case* was cited as authority for the proposition that sales to *ultimate consumers* are subject to state regulation, although interstate commerce may be involved. In any event, the recent pronouncements of the Supreme Court, as indicated above, put the emphasis entirely upon the circumstances of ultimate consumption and not upon the circumstance that a local distribution system may or may not be involved.

Further proof that the *Pennsylvania Gas Co. case* is still considered as authority, and that the state regulation there validated is not regarded as being confined to instances where local distribution systems and city franchises are involved, is to be found in the report of the House Committee on Interstate and Foreign Commerce (Report No. 709, 75th Congress, 1st Session, also quoted in *Illinois Natural Gas Co. v. Central Ill. Public Serv. Co.*, *supra*, page 506) favorably reporting H. R. 6586, which became the Natural Gas Act. The Committee there said:

"The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of Congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co. v. Public Service Commission* (1920) 252 U. S. 23) . . ." (page 1 of report)

The continuing authority of the *Pennsylvania Gas Co.* decision, when added to the repeated and consistent pronouncements of this Court dealing with a wide variety of other matters and types of regulation, clearly establishes that, under the relevant facts and circumstances of this case, the direct industrial sales, and state regulation thereof, are matters of local concern not requiring national uniformity of regulation and are hence subject to state regulation, even though assumed to be interstate commerce.

II.

Denial of State Power to Regulate Local Interstate Utility Service Would Upset a Long Standing and Well Considered Policy of Congress.

A. The Purpose of Congress in Exempting Industrial Sales From the Natural Gas Act was to Leave the States Free to Regulate Such Sales.

(1) LEGISLATIVE HISTORY OF NATURAL GAS ACT.

The purpose of Congress in enacting the Natural Gas Act, was to occupy the field in which the Supreme Court had held that the states may not act. Congress was neither seeking to preserve nor to create a hiatus in regulation, but was striving in the opposite direction, to fill the gap in regulation as it then existed. All this is revealed by the legislative history of the Act, as well as by a reading of its language.

Comprehensive federal regulation of interstate natural gas pipe line companies was first proposed in Title III of H. R. 5423, 74th Congress, introduced on February 6, 1935. This bill later developed into the Public Utility Act of 1935, but Title III was dropped, due to criticism of specific provisions and the fact that the Federal Trade Commission had not completed its investigation and report of utilities, authorized by Senate Res. 83, 70th Congress. See Federal Utility Regulation, Annotated (1943) Public Utilities Reports, Inc., pages 627-629.

On March 6, 1936, H. R. 11662, 74th Congress, relating exclusively to the regulation of natural gas companies, was introduced. Hearings on this bill were held, in April, 1936, before a subcommittee of the House Committee on Interstate and Foreign Commerce. Mr. Andrew R. McDonald, then a member of the Wisconsin Public Service Commission, and President of this Association, appeared before the Committee and presented a resolution which had been adopted by the Association. The leading paragraphs of this resolution read as follows:

Resolved, That this Association favors the enactment by Congress of legislation vesting jurisdiction in some one of the existing Federal regulatory commissions to regulate the service of supplying gas, whether artificial or natural, produced in one State and sold at wholesale to a distributing company in another State, including rates applicable to such service; and be it further

Resolved, That Congress be asked to limit the jurisdiction granted strictly to gas transmitted and sold at wholesale for resale, and that such legislation be so drawn as in no way to limit or impair the power of the States to regulate intrastate and local service and the rates applicable thereto;" (Printed hearings, page 81).

Mr. John E. Benton, then General Solicitor of the Association, also testified for the Association at the hearing on H. R. 11662. He made the following observations which are particularly significant because they were apparently concurred in by the committee as shown by the revisions subsequently made in the bill, and the report filed by the committee:

"... the United States Supreme Court has recognized that the distribution of gas locally to consumers, either for domestic or industrial use is a local business, and may be reached and controlled and regulated by local authorities, municipal and State, as provided by State law, so long as Congress withholds its hands from regulation . . ." (Printed hearings, page 85, emphasis supplied)

"It was evidently the purpose of the one who drew the act to reserve to the State authorities the right to regulate the consumer rate, even though the consumer was an industrial user who received his supply in a high-pressure main." (Printed hearings, page 95)

"What the State commissions ask Congress to do, is to regulate interstate intercompany transactions, but not to regulate the rate to any consumer, *whether he takes for industrial or domestic use*; to regulate the sale price of gas only when sold for resale." (Printed hearings, H. R. 11662, 74th Cong., House Committee

on Interstate and Foreign Commerce, page 95, emphasis supplied.)

Mr. Benton called attention to the fact that the proviso to section 1(b), as it was originally worded in H. R. 11662, exempted local distribution only if such distribution was made from low-pressure mains. (Printed House hearings, page 91) On behalf of the Association he presented a suggested amendment to correct this, and to make it plain that *any* sale to an ultimate consumer, for *either* domestic or industrial use, and whether from a high or low pressure main, would be exempt from federal regulation, and thus subject to state regulation. (Printed House hearings, page 95) Mr. Dozier A. De Vane, then Solicitor for the Federal Power Commission, told the Committee that the amendment would not weaken the bill, but would strengthen it. Mr. De Vane's exact words were:

... it is a little unusual for State Commissioners to come in as they have in connection with this bill, by the chairman of their association, and by their general counsel, and not only urge that the bill in its entirety be passed with no suggested amendment that would in any way weaken the bill, but suggest amendments that would strengthen the bill." (Printed House hearings, page 151).

The exact wording of this amendment was not accepted by the Committee, but the Committee made revisions in section 1(b) to accomplish the same purpose, as will later be pointed out.

The testimony of all witnesses who touched upon the point was that H. R. 11662 was not intended to take anything away from the states but was intended rather to complement state regulation—to overcome a hiatus in regulation. See the testimony, in the printed House hearings, of De Vane, pages 25 and 41; McDonald, pages 81 and 82; Benton, page 90; and Cole, page 148.

After completing its hearings on H. R. 11662, the Committee revised the bill and reintroduced it, on May 12,

1936, as H. R. 12680, 74th Congress. The following day the House Committee on Interstate and Foreign Commerce favorably reported H. R. 12680, Report No. 2651, 74th Congress, 2d Session. Section 1(b) of the new bill differed from the same section of H. R. 11662 in that it omitted all reference to high-pressure and low-pressure mains, and provided specifically for federal regulation of sales for resale *and for no other regulation of sales*. The exact wording of section 1(b), in H. R. 12680, is as follows:

"(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale of such gas for resale to the public, and to natural-gas companies engaged in such transportation or sale, but shall not apply to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas: *Provided*, That nothing in this Act shall be construed to authorize the Commission to fix the rates or charges to the public for the sale of natural gas distributed locally or for the sale of natural gas for industrial use only."

It will be observed that the revision of this section by eliminating the reference to high-pressure and low-pressure mains, made the intent clear, as Mr. Benton had urged before the Committee, that no local distribution was to be subject to federal regulation, regardless of the manner or method of its delivery. In its report on H. R. 12680, the Committee said:

"The bill takes no authority from State commissions and is so drawn as to be a complement, and in no sense an usurpation, of State regulatory authority . . ." (page 2)

H. R. 12680 was not acted upon by the 74th Congress, but it was reintroduced, on January 29, 1937, as H. R. 4008, 75th Congress. Hearings on the new bill were held before the House Committee in March, 1937, and again Mr. Benton presented the views of the Association. Since

the form of section 1(b) and the other provisions of the bill were now generally satisfactory to the Association, Mr. Benton's statement was brief and did not touch upon the question now under discussion. During the course of the hearing, however, another witness suggested an amendment to section 1(b) and Mr. Benton thereupon filed with the Committee a memorandum discussing the suggested amendment.

The amendment was proposed by Mr. W. A. Dougherty, representing several large pipe line companies. He chose to construe the proviso at the end of Section 1(b) as an exemption of sales to industrial consumers from all regulation, state as well as federal; and he proposed that sales for resale, when for the purpose of industrial use only, be also exempted from regulation under the Act (state regulation of sales for resale being considered already precluded under the Commerce Clause). Mr. Dougherty proposed to accomplish this exemption by adding the following words at the end of the proviso: "or for resale for industrial use only." (Printed House hearings on H. R. 4008, 75th Cong., page 124)

In Mr. Benton's answering memorandum, Mr. Dougherty's misunderstanding of the purpose of section 1(b) was pointed out and an alternative amendment was submitted to make it crystal clear that federal regulation of sales for resale extended to cases where the gas is to be used for industrial purposes only. Mr. Benton said:

"In this connection I point out that the exemption of industrial gas, as I understand your bill, is not for the purpose of exempting industrial gas from all regulation, but for the purpose of avoiding any possible claim that because some industrial user may be taking a very large quantity of gas, service to him, on account of its wholesale character, should be considered subject to regulation by the Federal Commission.

"Service to an industrial user is just as much a local service, and within State jurisdiction to regulate until Congress acts, as is a sale to a householder for domestic use. Until Congress occupies the field, a

sale for industrial use is accordingly subject to State regulation under the rule laid down in *Pennsylvania Gas Company v. New York Public Service Company*, above cited.

"Sales for industrial use ought not to be exempt from all regulation, for the result may very well be that unjustifiable discrimination will result, and there will be no commission to which complaint may be made. Sales for industrial uses plainly ought to be subject to regulation by the same Commission which regulates sales to other classes of consumers, so that just and reasonable rates, for the several classes of service, properly related to each other, may be established. Under the bill as drawn, all consumer sales are exempt from Federal regulation, and left to State regulation. The language of the suggested amendment just proposed leaves this purpose unaffected, and makes clear that the regulation of intercompany sales is designed for the protection of the consuming public, as a part of the complete regulation of the entire utility service." (Printed House hearings on H. R. 4008, 75th Cong., page 143.)

The principal suggestion contained in the amendment submitted by Mr. Benton in connection with the above statement was that the words "for resale to the public" be expanded to read "for resale for ultimate public consumption, for domestic, industrial, or any other use." These words were adopted by the Committee and appear in the Act today, with the addition only of the word "commercial" to still further strengthen the provision. It is impossible to believe that the Committee would accept Mr. Benton's amendment, word for word, without sharing his views, quoted above, upon which the amendment was based.

H. R. 4008 was never reported out, but was reintroduced, as H. R. 6586, 75th Congress, with section 1(b) changed, as indicated above, thus taking the exact form in which it appears in the Act today, which is as follows:

"(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for

resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

H. R. 6586 later became the Natural Gas Act. In its report favorably recommending H. R. 6586, (Report No. 709, 75th Congress, 1st Session) the House Committee said:

"... If enacted, the present bill would for the first time provide for the regulation of natural-gas companies transporting and selling natural gas in interstate commerce. It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character, and in the absence of Congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23). There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri v. Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Service Commission v. Attleboro Steam & Electric Co.* (1927), 273 U. S. 83). The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act." (House Report No. 709, 75th Cong., 1st Sess., page 1, emphasis supplied)

The Court below, after quoting the above Committee report, said:

"This language of the report clearly indicates the intent of Congress. It clearly indicates that the only sales to be regulated under the provisions of the bill were sales to local distributing utilities for resale. Failure to include sales direct to large industrial consumers indicates the thought upon the part of Congress that uniformity is not required in such sales and that they are so local in nature as properly to be left to state regulation." (R. 207, 71, N. E., 2d) 117, 124)

When H. R. 6586 reached the floor of the House on July 1, 1937, Congressman Lea, floor manager for the bill, repeated the substance of this statement. (Congressional Record, Vol. 81, Part 6, page 6721) Congressman Wolverton, also a member of the Committee which reported the bill, made substantially the same statement (page 6723).

The Senate Committee on Interstate Commerce held no hearings on H. R. 6586 after it had passed the House, but reported it favorably on August 9, 1937. The report (Report No. 1162, 75th Congress, 1st Session), merely quotes verbatim, the House Committee report on the same bill. Senator Wheeler, Chairman of the Senate Committee, discussed the bill when it reached the Senate floor on August 19. Pertinent to the question under consideration, Senator Wheeler said:

Wheeler. "Yes, it (the bill) is limited to transportation in interstate commerce, and it affects only those who sell gas wholesale . . . and let me say to the Senator that, as a matter of fact, the bill does not interfere with State regulation in any way, shape, or form." (Congressional Record, Vol. 81, Part 8, page 9312)

Wheeler. "This bill, of course, could not affect the price charged by the People's Gas Co. for gas produced in the State of Illinois, but when gas is brought into a State and sold at wholesale, the Federal authorities may simply go to the extent of saying, 'a reasonable price for this gas which is shipped at wholesale

is so much'—just as they fix rates for railroads. This is a very minor part of the regulation, and it touches *only the part of the gas business which is now regulated by anybody under any circumstances.*" (page 9315, emphasis supplied)

The bill did not pass the Senate in 1937 but went over until the following summer, when it was passed on June 7, 1938, without further debate and after the adoption of two minor amendments relating to other matters. (Congressional Record, Vol. 83, page 8347) The bill was approved by the President on June 21, 1938, and became the Natural Gas Act.

In spite of the overwhelming evidence to the contrary, as outlined above, Panhandle contends that the legislative history of the Natural Gas Act shows that Congress exempted direct industrial sales, not because they were subject to state regulation, but because such sales were adequately controlled by the competition of other fuels. In support of this statement, Panhandle, in its brief, quotes one excerpt from the hearings on H. R. 11662—taken from a written memorandum submitted to the Committee by Mr. Dozier A. De Vane. This excerpt reads as follows:

"The bill makes no attempt to regulate the production or gathering facilities of a natural-gas company. . . . Likewise natural gas in the process of transportation in high-pressure mains in interstate commerce for industrial use is excluded upon the basis that such sale is made under highly competitive conditions and is not imbued with a public interest . . ." (Printed House hearings, page 17)

Mr. De Vane's remark is the only suggestion in all the Congressional hearings on either H. R. 11662 or H. R. 4008, that the exemption of main line industrial sales was based upon competitive factors rather than the fact that such sales were subject to state commission regulation. There was data presented respecting the various uses of natural gas (H. R. 11662 hearings, pages 73, 77); and testi-

mony to the effect that *all* natural gas sales by pipe line companies, including sales for resale, were adequately regulated by competition (H. R. 11662 hearings, pages 102, 104, 114, 152); and testimony that industrial sales—without distinction between main line sales and industrial sales by local distributing companies—were adequately regulated by competition (H. R. 11662 hearings, pages 78, 108).

But nowhere, except in Mr. De Vane's memorandum quoted above, is a distinction drawn between the effect of competition upon direct industrial sales, and other industrial sales or sales of gas for other purposes. Nor could any such distinction have been drawn, for it is perfectly obvious that competition with other fuels is no more an adequate substitute for regulation in the case of direct industrial consumer sales made by a pipe line company, than in the case of industrial consumer sales made by distributing companies and admitted to be subject to state regulation.

Mr. Devane's remark, made early in the hearing on H. R. 11662, unquestionably gave the wrong justification for the limitation of regulation under the Act to sales for resale, leaving direct sales of industrial gas outside Commission jurisdiction; and Mr. Dougherty sought to adopt his expression as indicative of a Congressional understanding that industrial sales were sufficiently regulated by competition, and did not call for public regulation. But, in fact, the reason for confining regulation under the Act to sales for resale was *the determined purpose of Congress to leave all consumer sales to state regulation*,—not that Congress considered that industrial sales should be free from regulation. And Congress made this clear, as we have seen, by adopting the explicit language proposed by Mr. Benton, in the reframing of Section 1(b) to subject *sales for resale* of industrial gas to regulation under the Act to the same extent as all other sales.

In view of the affirmative statements of other witnesses; the lack of any testimony supporting Mr. De Vane's state-

ment; the Committee's acceptance of an amendment designed to negative the view suggested by Mr. De Vane; the statements contained in the committee reports and made by the floor managers during House and Senate debates on the bill, all as set out above—Mr. De Vane's solitary statement, quoted above, cannot be regarded as indicative of an intent on the part of Congress that industrial consumer sales should be unregulated. The true purpose of this legislation, to close the gap in regulation rather than enlarge or perpetuate it, was stated by Mr. De Vane, during the hearings on H. R. 11662, when he told the Committee:

"The real question we are dealing with here is this: There is a complete hiatus in the regulation of rates charged by these pipe line companies to local distributors of gas throughout the United States, and we are trying to augment State regulation by conferring authority upon a Federal agency to fix those rates." (page 41)

(2) JUDICIAL DISCUSSION OF LEGISLATIVE HISTORY.

Panhandle points, in its brief filed below, to language in recent Supreme Court decisions, wherein main line industrial sales are referred to as "unregulated business." *Colorado Interstate Gas Co. v. Federal Power Commission*, *supra*, and *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U. S. 626 (1945). The Court was referring to federal regulation, for that was the only matter before the Court, and its statement that such business was unregulated is a mere restatement of section 1(b) of the Act. But even if the Court was referring to all regulation, including state regulation, that would be without significance. The fact that direct industrial sales were not actually being regulated by the state would have no bearing upon the constitutional power of the state to provide such regulation—the only question now under discussion.

Panhandle also points to a tiny excerpt from the opinion of *Panhandle Eastern Pipe Line Company v. Federal*

Power Commission, 324 U. S. 635 (1945), reading as follows:

"The direct sales are made to nineteen industrial consumers on an interruptible basis and at prices fixed in competition with other fuels."

Here again, the fact that the state was not at the time exercising its constitutional power by prescribing prices for these industrial sales has no possible bearing upon the existence of such constitutional power. And it was fair to say, as did the Court, that where no regulation prescribing prices was in effect, the prices were being fixed by competition. This is not to say, and the Court did not say, that Congress intended to exempt such sales from state regulation because of the competitive factor.

The judicial interpretation which this Court places upon the Natural Gas Act is not reflected by such infinitesimal fragments of opinions, not related to any consideration of Congressional intent, but rather by those comprehensive statements of the Court which have dealt with the broad purposes of Congress in enacting the legislation. In *Public Utilities Commission v. United Fuel Gas Company*, 317 U. S. 456 (1942), the Court said:

"It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong., 2d Sess., pp. 1-3; H. Rep. No. 709, 75th Cong., 1st Sess., pp. 1-4; Sen. Rep. No. 1162, 75th Cong., 1st Sess." (page 4667 U. S.)

As aptly pointed out in the opinion of the Court below:

"Inferentially this means that those transactions over which jurisdiction was not given to the Federal Power Commission may be considered as local matters and left to state regulatory bodies. And again we remember that among transactions not included in the Act are direct sales to large industrial consumers." (R: 206, 71 N. E. (2d) 117, 124)

In *Federal Power Commission v. Hope Natural Gas Company*, *supra*, this Court expressed a similar view, saying:

"We pointed out in *Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, 314 U. S. 498, 506, 86 L. ed. 371, 376, 62 S. Ct. 384, that the purpose of the Natural Gas Act was to provide, 'through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation.' As stated in the House Report the 'basic purpose' of this legislation was 'to occupy' the field in which such cases as *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298, 68 L. ed. 1027, 44 S. Ct. 544; and *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83, 71 L. ed. 549, 47 S. Ct. 294, had held the State might not act. H. Rep. No. 709, 75th Cong., 1st Sess., p. 2. In accompanying that purpose the bill was designed to take 'no authority from State commissions' and was 'so drawn as to complement and in no manner usurp State regulatory authority.' *Id.* p. 2. And the Federal Power Commission was given no authority over the 'production or gathering of natural gas.' Sec. 1(b)" (page 349, U. S.)

(3) PANHANDLE'S REFERENCE TO REPORT NO. 800, 80TH CONGRESS.

In *Panhandle's* opening brief herein, great emphasis is placed upon a report of the House Committee on Interstate and Foreign Commerce, issued on July 7, 1947 (Report No. 800, 80th Congress, 1st Session) favorably re-

porting the so-called Rizley bill, H. R. 4051, amending the Natural Gas Act. Panhandle's brief refers to this report in no less than six places (pages 21, 22, 51-53, 56-57, 61-63, 65). The purpose of Panhandle in referring to this recent House Committee report is apparently two-fold: (1) To support Panhandle's view that Congress, in enacting the Natural Gas Act, intended to leave direct industrial sales of interstate gas free of all regulation (see pages 51, 61, 62 and 63 of Panhandle's brief); (2) to support Panhandle's view that the regulation of such industrial sales is a matter of national rather than local concern (see pages 21, 22, 51 and 53 of Panhandle's brief).

We believe that this Court will perceive at once that reference to this July, 1947 Committee Report for the purpose of determining the intention of Congress in enacting the Natural Gas Act, is wholly inappropriate. Nothing anybody (even a Congressional Committee) can say *after* an act has passed through Congress and become law can be legislative history, which may legitimately be given consideration as tending to show the intent of Congress when it passed the act.

The Natural Gas Act was enacted by the 75th Congress and became law on June 21, 1938. The Committee Reports and Congressional debates in connection with the consideration of H. R. 6586, which became the Natural Gas Act, constitute authentic legislative history to which the courts may freely advert in construing the Congressional intent embodied in the Act. This is likewise true of other bills introduced in the 75th and preceding Congresses, which are links in the progression of this legislation up to its enactment in 1938.

It is obvious, however, that no legislative activity since enactment of the Natural Gas Act in 1938 could constitute authentic evidence of the intent of Congress in passing that Act. This is true whether such later activity consists of the introduction of bills, the reports of committees, or debates in Congress. The most that such activity could reveal is the opinion of present members of Congress as

to the intent of a previous Congress. Needless to say, opinion evidence from any source is inadmissible on a question of statutory construction.

Even if such evidence were admissible it would be entitled to little weight under the circumstances of this case. The Committee Report was prepared in July, 1947, more than nine years subsequent to enactment of the Natural Gas Act. Of the 27 Congressmen who were members of the House Committee on Interstate and Foreign Commerce in May, 1938, only 6 are now on the Committee. Those six are: Charles A. Wolverton, Clarence F. Lea, Robert Crosser, Alfred L. Bulwinkle, Virgil Chapman and George G. Sadowski. None of these six hold-over members took a prominent part in the 1947 hearings or in the preparation of the Committee Report. Of these six, only Congressman Wolverton voted, during the House debate on July 11, 1947, against recommitment of the bill to the House Committee. Congressmen Crosser and Sadowski voted to recommit and the other three hold-overs did not vote. (Congressional Record, July 11, 1947, page 8925)

The Report in question was submitted by Congressman Carson and during the House debates on H. R. 4051 it was said that the Report was prepared under his direction. (Congressional Record, July 11, 1947, page 8909) Mr. Carson first entered Congress in January, 1943, and so has no personal knowledge of the intent of Congress in enacting the Natural Gas Act five years prior thereto. The author of the bill, Congressman Rizley of Oklahoma, first entered Congress in January, 1941, and is not, and never has been, a member of the House Committee on Interstate and Foreign Commerce.

Under the circumstances, the Committee Report in question is entitled to as little weight, as an authoritative guide to the construction of the Natural Gas Act, as this Court recently accorded to 1943 Congressional debates in construing the Norris-LaGuardia Act, enacted in 1932. In *United States v. United Mine Workers of America*, 67 S.

Ct. 677, it was urged that the Court should give weight to opinions as to the meaning of the Norris-LaGuardia Act, expressed by several Senators on the floor of the Senate in 1943, during debates on the War Labor Disputes Act. Rejecting evidence of this character, the Court said:

"We have considered these opinions, but cannot accept them as authoritative guides to the construction of the Norris-LaGuardia Act. They were expressed by Senators, some of whom were not members of the Senate in 1932, and none of whom was on the Senate Judiciary Committee which reported the bill. They were expressed eleven years after the Act was passed and cannot be accorded even the same weight as if made by the same individuals in the course of the Norris-LaGuardia debates. Moreover, these opinions were given by individuals striving to write legislation from the floor of the Senate and working without the benefit of hearings and committee reports on the issues crucial to us here. We fail to see how the remarks of these Senators in 1943 can serve to change the legislative intent of Congress expressed in 1932, and we accordingly adhere to our conclusion. . . ." (page 690)

As previously indicated, the Congressional Committees which reported the bills which became the Natural Gas Act, made the explicit statement that the states have been able to regulate sales to consumers "even though such sales are in interstate commerce" and that "There is no intention of enacting the present legislation to disturb the States in their exercise of such jurisdiction." (Report No. 709, 75th Cong., 1st Sess.) It is clear that the Court would not give weight to utterances on the floor of Congress conflicting with that Committee statement, even if such utterances were made during the debates on the bill. *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 125. Why, then, should the Court give greater weight to a conflicting Report, issued eight years later, by a Committee comprised almost wholly of new-comers and prepared by one who was not even in Congress in 1938?

But what utterly destroys the value of this 1947 Committee Report for any purpose helpful to Panhandle, is the fact that the bill which was favorably reported, H. R. 4051, did not become law. This bill passed the House on July 11, 1947, and, on July 17, was considered by the Senate Committee on Interstate and Foreign Commerce. At that time a motion by a member of the Committee to report favorably H. R. 4051, was defeated on a vote of 5 to 6. The bill is still pending before the Senate Committee and a subcommittee has been designated to hold further hearings. When the bill itself has been rejected, how can Panhandle possibly gain comfort from language in a Committee Report favorably reporting the bill?

This last consideration is also a complete answer to any contention that may be made that the language of the report evidences the view of Congress that direct industrial sales should be free and clear of state regulation. The report does contain language to that effect, as Panhandle quotes and requotes several times in its brief. But the bill favorably reported failed to become law and was, in fact, expressly rejected by the Senate Committee.

Under the circumstances the language of the Committee Report can be taken only to express the views of members of the House Committee or, more properly, of the limited number of members of that Committee who actively participated in the preparation of the report. Cast in this light, the views expressed in the Committee Report become no more than an-expression of views of individuals who happen to be members of Congress and of the House Committee. Opinion evidence of this character, even if admissible, and even if it had been properly admitted in evidence—both of which we deny—would be entitled to scant weight in considering the constitutional question here in question. That question is to be determined, not by board generalizations, but by reference to the facts of this particular case, as developed in the record, and the law, as established in the court decisions.

With respect To the merits of the views set forth in this Committee Report, the points therein mentioned relative to the undesirability of state regulation present no new consideration not already advanced by Panhandle. These points have been fully discussed in earlier sections of this brief and need not be repeated here.

(4) PANHANDLE'S REFERENCE TO AN AMENDMENT PRESENTED FOR THE ASSOCIATION AT THE HEARING ON THE RIZLEY BILL, H. R. 2185.

At page 56 of its opening brief Panhandle makes a quotation from a statement by the Advisory Counsel of the National Association of Railroad and Utilities Commissioners at the hearing on the Rizley bill, H. R. 2185, and on page 51 of said brief makes a quotation from the Committee Report, which has just been discussed in this brief. The quotations seem designed to create the impression that the primary purpose of presenting the amendment, referred to in the Committee Report, on behalf of the Association was to procure legislation subjecting direct sales in interstate commerce to state regulation. It may be well to point out that the amendment had a different and much broader purpose, and was designed to express the assent of Congress to state regulation of every gas utility operation removed from, or left outside, Federal Power Commission jurisdiction by the Act, *as proposed to be amended by the Rizley bill.*

That bill was an industry-backed bill to cut down Federal Power Commission jurisdiction over the natural gas industry. It was certain that if the bill should pass, as introduced, with no declaration of Congressional purpose, the interstate pipe lines would claim freedom from all regulation, as to operations excluded from the jurisdiction of the Commission under the Act, as amended. The amendment was designed to insure continued regulation of all gas utility operations by an expression of Congressional intent that every such operation not subject to regulation

under the amended Act should be left subject to regulation by state authority. This purpose, and the reason for it, will be clear from the language of the amendment, and from a somewhat more ample quotation from the Association statement respecting it than is to be found in the Panhandle brief. These follow:

"Amend section 1 of said bill by adding thereto the following subsections:

"(d). The Congress hereby declares that the regulation by the several States of the business of production and gathering of natural gas and of the transportation and sale thereof, except so far as by this act made subject to regulation by the Commission, is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to such regulation by State authority.

"(e) Except only so far as by this act made subject to the jurisdiction of the Commission, the business of production and gathering of natural gas, and transporting and selling the same, and every part of such business, is declared to be local in character, and shall continue to be subject to regulation under the laws of the several States, and such regulation shall not be held to be a burden on interstate or foreign commerce.'"

Discussing this proposed amendment, the Association statement said:

"We ask for the addition of two paragraphs to section 1. * * * These paragraphs declare that it is in the public interest that the natural-gas business shall be regulated, and that, except to the extent that it is subject to regulation by the Federal Power Commission under this act, it is considered local, and shall be subject to regulation by State authority. * * *

"This is in accordance with the original purpose of Congress when it first passed the Natural Gas Act. In the first paragraph of the first section of that act, the Congress found and declared that 'the business of transporting and selling natural gas for ultimate dis-

tribution to the public is affected with a public interest." That finding was as broad as the natural gas business. It related to the whole business, both that which was national in character, and that which was local. The entire business was declared 'affected with a public interest.' Congress also found and declared 'that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary,' but expressly limited the scope of the regulation provided in the second paragraph of the first section. The act was made to apply to transportation and sale in interstate commerce for resale, but to no other transportation or sale, and local distribution of natural gas and production or gathering were expressly excluded from Federal Power Commission regulation.

"Congress thus, while declaring the public interest in the regulation of the entire business, undertook with explicitness to declare what interstate transactions should be subjected to regulation by the Federal government. The intent was to regulate only what it was then understood the States could not regulate, leaving all other matters subject to regulation by the States. This was the basic purpose of the Congress in enacting the Natural Gas Act, as was very plainly stated by this committee, in its report on the bill. . . .

"... Notwithstanding the fact that Congress thus withheld Federal regulation from sales to consumers in recognition of the understood power of the States to regulate such sales, and with the express purpose that such jurisdiction on the part of the States should not be disturbed, some of the largest pipe line companies have refused to recognize State jurisdiction over sales to industrial consumers. Litigation is now pending in Indiana and Michigan, contesting the right of the States to regulate such sales. . . . In Indiana, in a very able and comprehensive opinion, the Supreme Court has held that industrial sales, as well as sales to other classes of consumers, may be regulated by the State, regardless of whether the sales should be regarded as intrastate or interstate. . . .

"... The great majority of sales of industrial gas are made by local distributing companies, and are unquestionably subject to State regulation.

"In a discussion of this bill, issued under date of March 17, 1947, by Mr. Disne, general counsel of the Independent Natural Gas Association, and by Mr. Brown, general counsel of the Independent Petroleum Association, it is said:

"Local distributors, which are regulated by State commissions, make approximately 95 percent of the sales to industries, the direct sales of the interstate lines being only 5 percent of this class of business."

"To exempt industrial sales of interstate gas from State regulation would disorganize State regulation, and would open the local field to the unregulated raids of unlicensed interstate pipe-line companies, which would skim off the cream of the business of local companies, represented by sales to large industrial users, and would leave the general rate-paying public, who must support the local companies, to absorb and bear the resulting loss of revenue from that business."

"The Indiana case is now on appeal by a petition for certiorari in the United States Supreme Court. We entertain no doubt that the Indiana court will be sustained. *We are not seeking legislation; but if this bill shall pass, we ask that it be made clear that it creates no twilight zone. The experience of the States with respect to industrial sales illustrates the great desirability, in the public interest, of making such intent clear, beyond all question.* . . ."

"The natural gas companies now ask this committee to give its sanction to a bill which aims to narrow the jurisdiction of the Federal Power Commission. It is uncertain how far the limiting amendments will reach. . . ."

"This much, however, is certain. Whatever interstate transactions of transportation and sale of natural gas this bill will operate to remove from the regulation of the Federal Power Commission ought not thereby to be placed outside the realm of regulation. . . ."

"The amendment proposed to section 1 has been drawn to make this intention clear. In drawing it, we have followed a path already marked out by Congress, and sanctioned by the judgment of the United States Supreme Court." (Printed Hearing, pages 642-644.)

B. The Natural Gas Act Accords with the Long-Standing Policy of Congress Respecting State Jurisdiction.

In the enactment of the Natural Gas Act, Congress was but following a settled policy of respecting the jurisdiction found to be exercised by the state commissions. In 1929 the state commissions, at the Annual Convention of the National Association of Railroad and Utilities Commissioners, adopted a resolution as follows:

Resolved, That, whereas under the principle established by the decision of the United States Supreme Court in Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, state authorities, in the absence of federal legislation, retain power to regulate local service of utilities which operate across state lines, including the rates for such service, this Association asks Congress not to interfere with the continued exercise of that power as to any class of public utilities by legislation vesting power to regulate such service and rates in any federal tribunal." (Proceedings, 41st Annual Convention, Natl. Assn. of R. R. & Util. Comm'rs., page 369).

This resolution was presented to the Congress from time to time when bills providing for federal utility regulation were under consideration. Congress complied with the request contained in this resolution.

Section 221 of the Communications Act of 1934 explicitly provides that nothing in the Act shall be construed to give the Federal Commission jurisdiction with respect to wire telephone exchange service "even though a portion of such exchange service constitutes interstate or foreign commerce, in any case where such matters are subject to regulation by a state commission or by local governmental authority."

Section 201(a) of the Federal Power Act, approved August 26, 1935, limits the jurisdiction of the Federal Power Commission in such fashion that it does not extend to any sale of power to a consumer.

It thus appears that, in conformity with the general plan of our government, under which matters of local concern, which do not so affect the interest of the states generally as to require federal control, are left to be dealt with by the states; control over the sale of gas, of electric energy, and of exchange telephone service, has been claimed by the states and has been recognized and respected by the Congress.

C. A Denial of State Jurisdiction in this Case Would Constitute a Far-reaching Precedent Adverse to Effective Regulation of All Local Utility Services.

The distributing companies which are engaged in supplying gas to consumers in Indiana have made large investments to enable them to render that service. They are required to serve at prices which will yield to them only a reasonable return. The prices they must charge inevitably depend to a considerable extent upon the volume of business which they do. Hence if Panhandle may take away their largest customers, the cost of gas service to consumers generally will necessarily be increased, and the procurement of reasonable rates through regulation will be defeated.

Panhandle, however, asserts the right, under the Commerce Clause, to disregard all state laws, because it brings the gas which it sells in Indiana from another state. If that contention, as to the effect of the Commerce Clause, is valid, then state regulation of direct sales and services rendered across state lines is inhibited, not only as to gas, but as to electric energy and as to telephone exchange service, and as to water and every other character of local utility service so rendered.

It will thus come about that the care exercised by the Congress to avoid grants of power to federal agencies to regulate such local services, instead of operating as Congress designed, (making such intent clear by express language in the above mentioned report on the Natural Gas

act) to leave such regulation to the states, will operate to leave such services wholly beyond the reach of any regulation by any agency, unless and until Congress shall hereafter legislate. Meantime the business of established gas and electric utilities, operating in conformity with state laws, will be subjected to the unregulated raids of interstate pipe-line and power companies, whenever such raids may appear profitable to their perpetrators. This will disorganize state regulation of public utilities and upset a well considered Congressional policy which has been followed in all acts providing for federal utility regulation.

It is plain that a decision preventing the regulation of the industrial sales here involved will produce immediate and greatly injurious results not only in Indiana but throughout the nation.

In a case which will thus affect a national situation, dealt with by Congress according to a consistent plan in a series of statutes extending back many years, it may be safely assumed that this Court will not render a decision denying state jurisdiction unless compelled thereto by some well recognized requirement of the Constitution. We respectfully urge that the decisions of this Court, cited herein, establish that there is no such requirement.

CONCLUSION.

The striking fact, developed by a study of all the Supreme Court decisions bearing on the subject, is that not once has the Supreme Court failed to sustain state regulation or taxation of sales to ultimate consumers of whatever kind or character. As Professor Thomas Reed Powell has said in his exhaustive survey of the cases (Harvard Law Review, Vol. LVIII, No. 7, 1945, page 1082):

"... the Supreme Court has from the beginning allowed the state both to tax and to fix the price on the first sale or delivery of gas or electricity brought in from a sister state when and if this first sale is also

necessarily the last sale because consummated by consumption. . . ."

It is also true that the trend of recent Supreme Court decisions runs in favor of sustaining state authority. As this Court very recently said in *Prudential Insurance Co. v. Benjamin*, *supra*:

"... the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce. . . ." (page 420)

It is submitted that, under the relevant facts and circumstances of the instant case, tested in the light of the language of the Natural Gas Act, of its legislative history, and of the foregoing Court decisions, the order of the Indiana Commission here under review is fully sustainable as an order dealing with matters of local concern subject to state regulation, in the absence of contrary action by Congress.

Respectfully submitted,

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October 28, 1947.

8.

SUPREME COURT OF THE UNITED STATES

No. 69.—OCTOBER TERM, 1947.

Panhandle Eastern Pipe Line Com- pany, Appellant, v. The Public Service Commission of Indiana, et al.	}	Appeal from the Supreme Court of the State of Indiana.
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[December 15, 1947.]

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

Broadly the question is whether Indiana has power to regulate sales of natural gas made by an interstate pipe-line carrier direct to industrial consumers in Indiana. More narrowly we are asked to decide whether the commerce clause, Const. Art. I, § 8, by its own force forbids the appellee, Public Service Commission, to require appellant to file tariffs, rules and regulations, annual reports, etc., as steps in a comprehensive plan of regulation preliminary to possible exercise of jurisdiction over rates and service in such sales.¹

Panhandle Eastern transports natural gas from Texas and Kansas fields into and across intervening states, including Indiana, to Ohio and Michigan. In Indiana it furnishes gas to local public utility distributing companies and municipalities. These in turn supply the needs of over 112,000 residential, commercial and industrial consumers.

Since 1942 appellant also has sold gas in large amounts direct to Anchor-Hocking Glass Corporation for indus-

¹ The Commission is authorized to take these steps by Indiana statutes creating the state's regulatory scheme for public utilities. Burns Ind. Stat. Ann. §§ 54-101 *et seq.*

2 · PANHANDLE EASTERN CO. v. COMM'N.

trial consumption.² Shortly before beginning this service appellant had informed a number of its customers, local distributing companies in Indiana, that it intended to render service directly to large industrial consumers wherever possible.³ Pursuant to that policy, since these proceedings began direct service has been extended to another big industrial user.⁴

In 1944 the Commission initiated hearings relative to direct service by Panhandle Eastern to Indiana consumers. It concluded that "the distribution in Indiana by Panhandle of natural gas direct to consumers is subject to regulation by this Commission under the laws of this state," notwithstanding any alleged contrary effect of the commerce clause upon appellant's direct sales to industrial users. Accordingly it issued its order of November 21, 1945, for the filing of tariffs, etc., as has been stated.

Early in 1946 Panhandle Eastern brought this suit in a state court to set aside and enjoin enforcement of the order. While the cause was pending the Commission issued a supplemental order declining appellant's offer to submit the specified tariffs, reports, etc., "as information only," and reasserting its full regulatory power as con-

² Appellant's sales to Anchor-Hocking are far larger than sales made to several of the local distributing companies. Thus, in 1943 appellant sold 1,150,279 cubic feet to Anchor-Hocking and only 151,065 cubic feet to the local utility served from the same branch line. See note 8 *infra*.

³ This was in 1941. In 1943 the chairman of appellant's board stated that "Panhandle was anxious to take over such business because it was unregulated transaction both as to the Federal Power Commission and the Public Service Commission of Indiana and that he intended to establish higher industrial rates based on a competitive fuel basis."

⁴ Prior to the hearings before the Commission appellant had entered into arrangements to provide direct industrial service to an E. I. DuPont de Nemours & Company plant near Fortville, Indiana. That service was commenced subsequent to the hearings.

ferred by the Indiana statutes.⁵ 63 P. U. R. (N. S.) 309.

The trial court vacated the orders and enjoined the Commission from enforcing them. It accepted appellant's view of the effect of the commerce clause on its operations. The Supreme Court of Indiana reversed that judgment and denied the relief appellant sought. — Ind. —, 71 N. E. 2d 117. It held first that the Commission's orders amounted to an unequivocal assertion of power to regulate rates and service on appellant's direct industrial sales and thus presented squarely the question of the Commission's jurisdiction over such sales as affected by the commerce clause. The court did not flatly hold that the sales are in interstate rather than intrastate commerce. But, taking them to be of the former kind, it held them nevertheless subject to the state's power of regulation under the doctrine of *Cooley v. Board of Wardens*, 12 How. 299. The court further held that appellant, in making these sales, is a public utility within the meaning and application of the state's regulatory statutes; Burns Ind. Stat. Ann. §§ 54-105 and Ind. Acts 1945, c. 53, p. 110. It is this decision we have to review pursuant to § 237 of the Judicial Code, 28 U. S. C. 344 (a).⁶

⁵ In the trial court the Commission had urged, as it still does, that its first order merely required the filing of information and that no action would lie to contest its power to fix rates or otherwise regulate the sales until that power was exercised. This resulted in bringing forth appellant's tender of compliance as "information only," conditioned upon the Commission's acceptance of the filing as such and without prejudice to appellant's right to contest the validity of any subsequent order. The supplemental order expressly stated that the filing, if any, would be deemed to be for the purpose of and available for use by the Commission in carrying out its further duties under the statute.

⁶ Several of the local utility companies, which had been intervenors in the proceedings before the Commission, were permitted to intervene in the court test of the orders and are appellees here. The National Association of Railroad and Utilities Commissioners has filed a brief *amicus curiae* in support of the Commission's position.

The effect of the state statutes, whether permitting the filing of the tariffs, etc., as information unrelated to further regulation or requiring the filing as initial and integral steps in the regulatory scheme, and thus as presenting at the threshold of the scheme's application the question of the state's power to go further with it, is primarily a question of construction for the state courts to determine. In view of the Commission's position, as construed by the state supreme court, we cannot say that the only thing presently involved is the state's power to require the filing of information without reference to its further use for controlling these sales. Cf. *Arkansas Louisiana Gas Co. v. Department of Public Utilities*, 304 U. S. 61. Here the orders constituted "an unequivocal assertion of power" to regulate rates and service. Indeed they involve something more than a mere threat to apply the regulatory plan in its later phases. They represent the actual application of that plan in its initial stage. In such a situation appellant was not required to await a further regulatory order before contesting the Commission's jurisdiction. Cf. *Public Utilities Comm'n v. Gas Co.*, 317 U. S. 456.

This does not mean that we now express opinion concerning the validity of any further order which the Commission may enter. No such order is before us. It does mean that we are required to decide whether the sales in question lie within the scope of the state's power to regulate rates and service, so that some further order in those respects may or may not be entered.

Nor do we question that these sales are interstate transactions. The contrary suggestion left open in the state supreme court's treatment rests upon the view that gas transported interstate takes on the character of a commodity which has come to rest or broken bulk when it leaves the main transmission line and, under reduced pressure, enters branch lines or laterals irrevocably on its

way to final distribution or consumption. Those merely mechanical considerations are no longer effective, if ever they were exclusively, to determine for regulatory purposes the interstate or intrastate character of the continuous movement and resulting sales we have here.⁷

Thus gas furnished to local utilities for resale is supplied unquestionably, both as to transportation and as to sale, in interstate commerce. Yet it is subjected to practically identical changes in pressure with the gas sold by appellant directly for industrial use.⁸ Neither practical common sense nor constitutional sense would tolerate holding that reduction in pressure makes the industrial sales to

⁷ In *Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498, 504, the Court referred to earlier decisions turned by "applying this mechanical test for determining when interstate commerce ends and intrastate commerce begins," namely, "upon the introduction of the gas into the service pipes of the distributor," and then stated: "In other cases, the Court, in determining the validity of state regulations, has been less concerned to find a point in time and space where the interstate commerce in gas ends and intrastate commerce begins, and has looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce. Cf. *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 185, 187, *et seq.*; *California v. Thompson*, 313 U. S. 109, 113, 114; *Duckworth v. Arkansas* [314 U. S.], p. 390." 314 U. S. at 505.

⁸ Appellant's gas enters Indiana in a 22-inch main at a pressure of 250 pounds or more per square inch. In the state the gas enters a 16-inch branch line at a pressure of 200 pounds per square inch, and then a 6-inch lateral line at a pressure of 100 pounds per square inch. In the lateral line the gas is transported to two adjacent meter houses. From one house gas is delivered to Anchor-Hocking at pressures as low as 10 pounds per square inch, while from the other deliveries are made to a local distributing company at pressures ranging from 9. to 25 pounds per square inch.

Similarly, gas from other laterals stemming from appellant's main line is reduced to a pressure of 16 pounds per square inch before being furnished to the DuPont plant and to pressures of approximately 20 pounds per square inch for two utility companies served from the same lateral as the DuPont plant.

6 PANHANDLE EASTERN CO. v. COMM'N.

Anchor-Hocking wholly intrastate for purposes of local regulation while deliveries at similar pressures to utility companies remain exclusively interstate. Variations in main pressure are not the criterion of the states' regulatory powers under the commerce clause. Cf. *Interstate Gas Co. v. Power Comm'n*, 331 U. S. 682, 689. The sales here were clearly in interstate commerce.

The controlling issues therefore are two: (1) Has Congress, by enacting the Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717, in effect forbidden the states to regulate such sales as those appellant makes directly to industrial consumers; (2) if not, are those sales of such a nature, as related to the *Cooley* formula, that the commerce clause of its own force forbids the states to act.

We think there can be no doubt of the answer to be given to each of these questions, namely, that the states are competent to regulate the sales. The two questions may best be considered in the background of the legislative history of the Natural Gas Act and of the judicial history leading to its enactment in 1938.

Prior to that time this Court in a series of decisions had dealt with various situations arising from state efforts to regulate the sale of imported natural gas. The story has been adequately told⁹ and we do not stop to review it again or attempt reconciliation of all the decisions or their groundings. Suffice it to say that by 1938 the Court had delineated broadly between the area of permissible state control and that in which the states could not intrude. The former included interstate direct sales to

⁹For a summary of the leading decisions concerning the sale and transportation of gas prior to the passage of the Natural Gas Act, see *Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498, 504-505. See also Powell, Note, Physics and Law—Commerce in Gas and Electricity, 58 Harv. L. Rev. 1072; Howard, Gas and Electricity in Interstate Commerce, 18 Minn. L. Rev. 611.

local consumers, as exemplified in *Pennsylvania Gas Co. v. Public Service Comm'n*, 252 U. S. 23; the latter, service interstate to local distributing companies for resale, as held in *Missouri v. Kansas Gas Co.*, 265 U. S. 298, reinforced by *Public Utilities Comm'n v. Attleboro Co.*, 273 U. S. 83.

Shortly then, as the decisions stood in 1938, the states could regulate sales direct to consumers, even though made by an interstate pipe-line carrier. This was true of sales not only for domestic and commercial uses but also for industrial consumption, at any rate whenever the interstate carrier engaged in distribution for all of these uses.¹⁰ On the other hand, sales for resale, usually to local distributing companies, were beyond the reach of state power, regardless of the character of ultimate use. This fact not only prevented the states from regulating those sales but also seriously handicapped them in making effective regulation of sales within their authority.¹¹

¹⁰ Appellant contends that "wholesale," i. e., large quantity, service direct to industrial consumers, as exemplified by its sales to Anchor-Hocking, is to be distinguished from the sales in *Pennsylvania Gas Co. v. Public Service Comm'n*, 252 U. S. 23, which were made in a manner commonly associated with a local distribution system supplying gas to consumers in a city. Nothing in the decision, however, requires it to be so limited. On the contrary, emphasis may rather be placed on the fact that both situations involve sales to ultimate consumers, Anchor-Hocking being just as clearly in that category as the "factories and residences" served by the company in the *Pennsylvania Gas Co.* case. See *Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498, 505, where Chief Justice Stone, in summarizing the *Pennsylvania Gas Co.* case, stated that it involved gas "sold directly to ultimate local consumers"; *Jersey Central Co. v. Power Comm'n*, 319 U. S. 61, 78, 80 (dissenting opinion); Powell, Note, 58 Harv. L. Rev. 1072, 1082, quoted *infra* note 12.

¹¹ The *Attleboro* decision, 273 U. S. 83, had been made in the face of the Rhode Island Commission's finding that the Narragansett company in selling electric current interstate to the Attleboro company was suffering an operating loss while the rates to its other customers

8 PANHANDLE EASTERN CO. v. COMM'N.

This impotence of the states to act in relation to sales for resale by interstate carriers brought about the demand for federal regulation and Congress' response in the Natural Gas Act. To reach those sales and prevent the hiatus in regulation their immunity caused, the Act declared in § 1 (b):

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use; and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

This section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the

yielded a fair return; and over the Commission's contentions grounded on that finding that it could not effectively regulate rates of the Narragansett company to its local consumers without also regulating its rates to the Attleboro company.

Compare the memorandum submitted on behalf of the National Association of Railroad and Utility Commissioners by its general solicitor, Mr. John E. Benton, Hearings before Committee on Interstate and Foreign Commerce on H. R. 4008, 75th Cong., 1st Sess. 141, 143: "Sales for industrial use ought not to be exempt from all regulation, for the result may very well be that unjustifiable discrimination will result, and there will be no commission to which complaint may be made. Sales for industrial uses plainly ought to be subject to regulation by the same Commission which regulates sales to other classes of consumers; so that just and reasonable rates, for the several classes of service, properly related to each other, may be established."

Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.

The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act "shall not apply to any other . . . sale . . ." (Emphasis added.) Those words plainly mean that the Act shall not apply to any sales other than sales "for resale for ultimate public consumption for domestic, commercial, industrial, or any other use." Direct sales for consumptive use of whatever sort were excluded.

The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed.¹²

Moreover, this unusual legislative precision was not employed with any view to relieving or exempting any segment of the industry from regulation. The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the

¹² "[T]he Supreme Court has from the beginning allowed the state both to tax and to fix the price on the first sale or delivery of gas or electricity brought in from a sister state when and if this first sale is also necessarily the last sale because consummated by consumption."—Powell, Note, 58 Harv. L. Rev. 1072, 1082.

prior decisions.¹³ The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. This appears not merely from the situation which led to its adoption and the legislative history, including the committee reports in Congress cited above, but most plainly from the history of § 1 (b) in respect to the changes which took place in reaching its final form.¹⁴

¹³ In H. Rep. No. 709, 75th Cong., 1st Sess., the Committee on Interstate and Foreign Commerce said of the proposed bill, which became the Natural Gas Act: "It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co. v. Public Service Commission*, (1920), 252 U. S. 23.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri v. Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Service Commission v. Attleboro Steam & Electric Co.* (1927) 273 U. S. 83.) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

See also H. Rep. No. 2651, 74th Cong., 2d Sess. 1-3; Sen. Rep. No. 1162, 75th Cong., 1st Sess.

¹⁴ In the hearings on H. R. 4008, the bill in the 75th Congress, the representative of several large pipe-line companies construed § 1 (b) as it then stood to exempt sales to industrial consumers from all regulation, state as well as federal, and proposed an amendment exempting sales for resale, when for industrial use only, from regulation under

It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption. Yet this, in effect, is what appellant asks us to do. For the essence of its position, apart from standing directly on the commerce clause, is that Congress by enacting the Natural Gas Act has "occupied the field," i. e., the entire field open to federal regulation, and thus has relieved its direct industrial sales of any subordination to state control.

the proposed legislation. Hearings before Committee on Interstate and Foreign Commerce H. R. 4008, 75th Cong., 1st Sess. 124. In an answering memorandum, Mr. Benton pointed out the pipeline representative's misunderstanding of the purposes of § 1 (b), stating that "service to an industrial user is just as much a local service . . . as is a sale to a householder for domestic use . . . [and] until Congress occupies the field, a sale for industrial use is accordingly subject to State regulation . . ." *Id.* at 143. He proposed an alternative amendment to render it clear beyond doubt that federal regulation of sales for resale extended to transactions where the gas was to be used for industrial purposes only. *Id.* at 142. Mr. Benton's amendment was adopted by the House committee and appears in substantially unaltered form in § 1 (b) of the Natural Gas Act as finally enacted. In H. Rep. No. 709, 75th Cong., 1st Sess., the committee emphasized that Mr. Benton and other representatives of state commissions and municipalities appeared in support of the bill.

In support of its position appellant relies in part on H. Rep. No. 800, 80th Cong., 1st Sess., favorably reporting H. R. 4051 amending the Natural Gas Act. This bill did not become law. The views expressed in the committee report made in 1947, some nine years after the Natural Gas Act's passage, are hardly determinative or, in juxtaposition with the contemporaneous history, persuasive of the congressional intent in passing that Act.

The exact opposite is the fact. Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach.¹⁵ That area did not include direct consumer sales, whether for industrial or other uses. Those sales had been regulated by the states and the regulation had been repeatedly sustained. In no instance reaching this Court had it been stricken down.¹⁶

It is true that no case came here involving state regulation of direct industrial sales wholly apart from sales for other uses. In the cases sustaining state power, whether to regulate or to tax, the company making the industrial sales was selling also to domestic and commercial users.¹⁷ But there was no suggestion, certainly no decision, that a different result would follow if only direct industrial sales were being made. Neither the prior judicial line nor the statutory line was drawn between kinds of use or on the relation between sales for different uses. Both lines were drawn between sales for use, of whatever kind, and sales for resale. Cf. *Colorado Interstate Co. v. Comm'n*, 324 U. S. 581, 595-596.

The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority.

¹⁵ See notes 12 and 13 *supra*.

¹⁶ *Ibid*.

¹⁷ *Pennsylvania Gas Co. v. Public Service Comm'n*, 252 U. S. 23, appears to be the only case flatly ruling the point for regulatory purposes. But its authority was clearly recognized in *Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498, 505, cf. note 10 *supra*; *Missouri v. Kansas Gas Co.*, 265 U. S. 298, 308; *Public Utilities Comm'n v. Attleboro Co.*, 273 U. S. 83, 87, and other cases, as well as in the congressional report quoted in note 13.

Public Utilities Comm'n v. Gas Co., 317 U. S. 456, 467;

Power Comm'n v. Hope Gas Co., 320 U. S. 591, 609-610;

Interstate Gas Co. v. Power Comm'n, 331 U. S. 682, 690.

And, as was pointed out in *Power Comm'n v. Hope Gas Co.*, *supra* at 610, "the primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies." The scheme was one of co-operative action¹⁸ between federal and state agencies. It could accomplish neither that protective aim nor the comprehensive and effective dual regulation Congress had in mind, if those companies could divert at will all or the cream of their business to unregulated industrial uses.¹⁹

The Natural Gas Act therefore was not merely ineffective to exclude the sales now in question from state control. Rather both its policy and its terms confirm that control. More than "silence" of Congress is involved. The declaration, though not identical in terms with the one made by the McCarran Act, 59 Stat. 33, 15 U. S. C. § 1011, concerning continued state regulation of the insurance business, is in effect equally clear, in view of the Act's historical setting, legislative history and objects, to show intention for the states to continue with regulation where Congress has not expressly taken over. Cf. *Prudential Ins. Co. v. Benjamin*, 328 U. S.

¹⁸ The jurisdiction granted the Federal Power Commission by the Natural Gas Act necessitates close correlation with state regulatory bodies. Section 17 of the Act provides for cooperation between the federal and state agencies. See note 23 and text.

¹⁹ Over 38 per cent of the gross revenues of the local Indiana utilities from the sale of gas is derived from service to the approximately 250 industrial consumers served by them. If service to any substantial number of the industrial users were to be taken over by appellant, the local utilities not only would suffer great losses in revenue, but would be unable to dispense with more than a trivial percentage of their plant properties. The resultant increase in unit cost of gas would lead necessarily to increased rates for the consumers served by the local companies.

408. Congress has undoubted power to define the distribution of power over interstate commerce. *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 769, and authorities cited; cf. *Prudential Ins. Co. v. Benjamin*, *supra*. Here the power has been exercised in a manner wholly inconsistent with exclusion of state authority over the sales in question.

Congress' action moreover was an unequivocal recognition of the vital interests of the states and their people, consumers and industry alike, in the regulation of rates and service. Indiana's interest in appellant's direct sales is obvious. That interest is certainly not less than the interest of California and her people in their protection against the evil effects of wholly unregulated sale of insurance interstate. *Robertson v. California*, 328 U. S. 440. Not only would industrial consumers in most instances go without protection as to rates and service other than that supplied by competition from other fuels,²⁰ but the state's regulatory system would be crippled and the efforts of the Indiana Commission seriously hampered in protecting the interests of other classes of users equally if not more important.²¹

As against these vital local interests, becoming more important with every passing year in the steady transition from use of more primitive fuels to natural gas and fuel oils, appellant seeks to set up its own interest in complete freedom from regulation and, if any is to be

²⁰ Pipe-line service, by the very physical conditions characterizing the industry and magnitude of investment required, acquires large monopolistic effects, more particularly in marketing areas distant from producing ones. Cf. *Power Comm'n v. Hope Gas Co.*, 320 U. S. 591, 610, n. 17 and text. Most often its competition is with other fuels rather than competing pipe lines.

²¹ See note 19. Cf. *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346; *Robertson v. California*, 328 U. S. 440, 448; *Industrial Gas Co. v. Public Utilities Comm'n of Ohio*, 135 Ohio St. 408, 412; *In re Service Gas Co.*, 15 P. U. R. (N. S.) 202.

imposed, a supposed national interest in uniform regulation. (The national interest, considered apart from its own, is largely illusory on this record. For itself, the company asserts that state regulation of prices and service will amount to a power of blocking the commerce or impeding its free flow.

There are two answers. One is experience. Insofar as this phase of the natural gas industry has been subjected to state regulation to date, those effects have not been shown to occur. The other answer, in case that experience should vary, is the power of Congress to correct abuses in regulation if and when they appear. State power to regulate interstate commerce, wherever it exists, is not the power to destroy it, unless Congress has expressly so provided.²² It is the power to require that it be done on terms reasonably related to the necessity for protecting the local interests on which the power rests.

Appellant also envisages conflicting regulations by the commissions of the various states its main pipe line serves, particularly in relation to curtailment of service when weather conditions or others require it, and fears conflict also between the state commissions and the Federal Power Commission. It assigns these possibilities in support of its view that national uniform regulation alone is appropriate to its operations. There is no evidence thus far of substantial conflict in either respect²³ and we do not see that the probability of serious conflict is so strong as

²² *Kentucky Whip & Collar Co. v. Illinois Cent. R. Co.*, 299 U. S. 334; *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311; *United States v. Darby*, 312 U. S. 100.

²³ There is no evidence of any conflict in the asserted exercise of jurisdiction by the appellee Commission with any functions of the Federal Power Commission. In granting appellant permission under § 7 (c) of the Natural Gas Act to extend its facilities to serve the DuPont plant, see note 4 *supra*, the Federal Power Commission specifically provided that the order was "without prejudice to the

to outweigh the vital local interests to which we have referred requiring regulation by the states. Moreover, if such conflict should develop, the matter of interrupting service is one largely related, as appellees say, to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states.²⁴

These considerations all would lead to the conclusion that the states are not made powerless to regulate the sales in question by any supposed necessity for uniform national regulation but that on the contrary the matter is of such high local import as to justify their control, even if Congress had remained wholly silent and given no indication of its intent that state regulation should be effective. But in this case, in addition to those considerations taken independently, the policy which we think Congress has clearly delineated for permitting and supporting state regulation removes any necessity for determining the effect of the commerce clause independently of action by Congress and taken as operative in its silence.

The attractive gap which appellant has envisioned in the coordinate schemes of regulation is a mirage. The judgment of the Supreme Court of Indiana is

Affirmed.

MR. JUSTICE JACKSON concurs in the result.

MR. JUSTICE MURPHY took no part in the consideration or decision of this case.

authority of the Indiana Commission in the exercise of any jurisdiction which it may have over the sale or service proposed to be rendered by Panhandle Eastern to du Pont." Cf. note 18.

²⁴ See note 23.